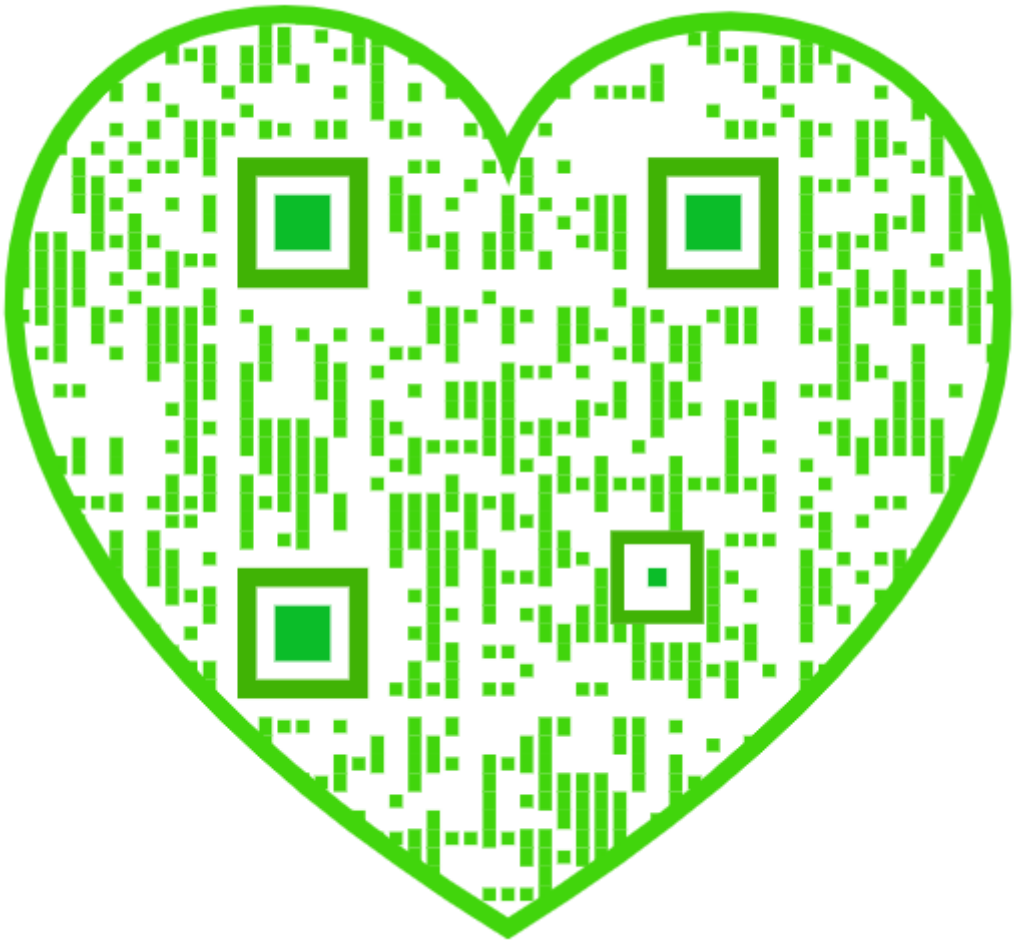

PRATTS'

MANUAL OF BANKING LAW:

A TREATISE

ON THE

LAW APPLICABLE TO THE EVERY-DAY BUSINESS OF BANKS.

DESIGNED AS

A CLEAR AND ACCURATE STATEMENT, IN A SMALL COMPASS, OF THE GENERAL PRINCIPLES OF BANKING LAW AND THE DUTIES, POWERS, AND LIABILITIES OF BANK OFFICERS.

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PREFACE.

In presenting this epitome of banking law to the public, we would state that the publication of such a work has been on our minds for several years on account of the demand, we having been repeatedly asked by correspondents if such a treatise were extant.

The purpose of the book is simply to give bankers and persons having dealings with banks sufficient information concerning the law relating to banking to enable them to act intelligently on questions arising in the daily routine of business.

It is needless to say that a book of this kind could be written only by a professional lawyer, thoroughly acquainted with legal principles and technicalities. We have been fortunate in securing for the preparation of this work the services of a lawyer specially versed in banking law, and we are confident it will be found that his statements of that law are both clear and accurate.

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MANUAL OF BANKING LAW.

PART I.

THE BANKING BUSINESS.

CHAPTER I.

THE DIFFERENT KINDS OF DEPOSITS.

Deposits made with banks are of two sorts, usually known as general deposits and special deposits. These differ very materially in their legal effects, and in the relationship which they, respectively, establish between the bank and the customer. When the expression "deposit with a bank" is used without any qualifying terms, it is commonly understood that a general deposit is meant; deposits of this kind being the rule and those of the other kind the exception.

General Deposits.—Where one has made a general deposit, what he has with the bank is not, in fact, money (although it is customary to speak of it as such), but merely a credit. For when money is left with the bank in the ordinary way, without any special agreement, the title to it passes to the bank absolutely, and what the customer gets in return for it is a credit with the bank for the amount so deposited, with or without interest, as the case may be. The relation between the bank and the depositor, then, is the ordinary relation of

debtor and creditor.[1] In substance, the deposit is a loan by the latter to the former. If the money should be stolen immediately after the deposit is complete, the loss would fall upon the bank, and it could not relieve itself from liability to the customer by showing that there was no neglect on its part, as it might if the title to the money had not passed to it, for the money stolen was its own. On the other hand, should the bank fail, the customer, even though he might be able to identify the money or the bill or note, could not claim the deposit as his; he could come in only on a footing with other creditors.[2] Then, too, the bank being merely a debtor may discharge its indebtedness to the depositor in any currency that is legal tender, although the deposit was made in gold, unless there was a special agreement to repay in like currency;[3] and, conversely, the bank must pay currency that is legal tender, although the deposit was made in a currency that has since depreciated.[4]

And not only is this the relation which exists between a bank and an ordinary depositor, but generally it is the relation existing between banks which are correspondents of each other. Thus, where one bank makes collections for another, and the avails of the collections are placed by the collecting bank with its own funds, and

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[1] Foley *v.* Hill, 2 H. L. Cases, 28; Marine Bank *v.* Fulton Bank, 2 Wall., 252; Bank of Republic *v.* Millard, 10 Wall., 152; Phœnix Bank *v.* Risly, 111 U. S., 125; Commercial Bank *v.* Hughes, 17 Wend., 94; Bank of Northern Liberties *v.* Jones, 42 Penn. St., 536.

[2] People *v.* City Bank of Rochester, 93 N. Y., 582.

[3] Thompson *v.* Riggs, 5 Wall., 663.

[4] Marine Bank *v.* Chandler, 27 Ill., 525.

credited on account to the transmitting bank (as is the usual custom), the relation between them will be simply that of debtor and creditor.[1]

Special Deposits.—In the case of a special deposit the bank becomes a bailee or trustee of the funds deposited, according to the circumstances, but never owner. The property in the funds remains in the depositor, and the bank merely takes care of them for him, or makes such disposition of them as he directs. Its power over them is not absolute, as in the case of a general deposit, but is limited to the purposes for which the deposit was made. If they are lost, the loss must fall upon the depositor, there being no negligence on the part of the bank; and, on the other hand, should the bank fail, they would not go into the general fund for the creditors, but could be recovered specifically by the depositor.[2]

Special deposits are frequently spoken of as though they comprised only deposits for safe-keeping; but this is not accurate. Any deposit made with a bank where it is the intention of the parties that the property in the money or other thing deposited shall not pass to the bank, and that the ordinary relation of bank and depositor shall not be established, is, in the proper sense, a special deposit.[3]

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[1] Marine Bank *v.* Fulton Bank, 2 Wall., 252.

[2] Marine Bank *v.* Fulton Bank, 2 Wall., 252; Dawson *v.* Real Estate Bank, 5 Ark., 283; People *v.* City Bank of Rochester, 93 N. Y., 582; St. Louis *v.* Johnson, 5 Dillon, 268.

[3] For illustrations of this see People *v.* City Bank of Rochester, 93 N. Y., 583; St. Louis *v.* Johnson, 5 Dillon, 268; Nat'l Bank of Fishkill *v.* Speight, 47 N. Y., 668.

In What Cases Deposit is General and in What Cases Special.—Such being the different effects of a general and a special deposit, it often becomes a question of great importance to which class a certain deposit belongs. It has been stated as a general rule "that where money, not in a sealed packet, or closed box, bag, or chest, is deposited with a bank or banking corporation, the law presumes it to be a general deposit, until the contrary appears; because such deposit is esteemed the most advantageous to the depositary, and most consistent with the general objects, usages, and course of business to such companies or corporations. But if the deposit is sealed or locked up, or otherwise covered or secured in a package, cash box, bag, or chest, or anything of the like kind, of or belonging to the depositor, the law regards it as a pure or special deposit, and the deposit thereof only for safe-keeping and accommodation of the depositor."[1]

While this rule is doubtless correct in the main, it is certainly not of universal application; for we know that banks every day receive sealed packages and bags of money which they treat as general deposits; and, on the other hand, they receive loose money which is treated as a special deposit. Nor is it conceived that any general rule can be formulated which would afford a test in all cases. The question is one which must be decided upon the facts of the particular case in which it arises.

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[1] Dawson *v.* Real Estate Bank, 5 Ark., 283.

CHAPTER II.

TO WHAT OFFICER SHOULD BE PAID IN.

In receiving deposits a bank must, of course, act through its agents. But not every officer or agent of the bank is authorized to receive deposits. And a deposit made with a person who is not an agent of the bank for this purpose will fasten no liability upon the bank, unless the customer can show that the money actually came into the bank's possession. By delivering his funds to an officer or employé who is not authorized to receive them for the bank, the customer makes that person his own agent for the purpose of delivering the funds to the bank; and, therefore, if such person should lose or misappropriate such funds, the loss would fall, not upon the bank, but upon the customer.[1]

In large banks there is usually an officer, called the receiving teller, who has his place at the counter and whose special duty it is to receive deposits. And where a bank has a receiving teller, the paying teller, the book-keeper, or the clerks have usually no authority to receive deposits, except in special instances or on special occasions. Hence payments should always be made to the receiving teller, if practicable.

But in the matter of receiving deposits, as in other matters, the bank will be bound by the acts of one whom it has clothed with an apparent authority to act for it. And, therefore, where payment is made to a

[1] Manhattan Company *v.* Lydig, 4 Johns., 377; Thatcher *v.* Bank of State of New York, 5 Sandf., 121.

person who, with the knowledge of the managing officers, is permitted to take money from customers, the bank cannot be heard to deny that such person was authorized to receive the deposit.[1] Thus, where a package of bills, addressed to the cashier, was delivered to an employé who had been placed behind the counter and allowed to act as an assistant to the receiving teller, the bank was held to be bound by the receipt.[2]

As the cashier is the principal financial officer of the bank, whose duty it is to take charge of all the money and funds of the bank, it is conceived that a deposit made with him will be considered to have been made with the bank, unless his power in this respect has been limited, and this fact is known to the customer.[3] And upon principle it would seem that the fact that the bank has a receiving teller would not operate as a limitation upon the authority of the cashier to receive deposits, for the teller is but a subordinate of the cashier, and, as has been said by the Supreme Court of the United States, is, as it were, but the arm by which the cashier performs a part of his functions.[4]

Deposits should not be tendered to officers of the bank outside of the banking-house, unless it is known that they have authority so to receive them. Ordinarily they have no such authority.

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[1] Hotchkiss *v.* Artisans' Bank, 42 Barb., 517; East River Bank *v.* Gove, 57 N. Y., 597.

[2] Hotchkiss *v.* Artisans' Bank, *supra.*

[3] Merchants' Bank *v.* State Bank, 10 Wall., 604.

[4] *Id.*

CHAPTER III.

DEPOSITS OF CHECKS, NOTES, AND BILLS.

Where a check, note, bill, or other security deposited with or transmitted to a bank is, with the knowledge and consent of the customer, received and credited as so much money, the property in the instrument passes to the bank, and the bank becomes the debtor to the customer in the amount so credited. The transaction, in its effect, is equivalent to the discount or payment of the instrument by the bank, the deposit of the proceeds by the customer, and a credit for the amount in his bank account. The instrument is then at the risk of the bank, and the only recourse the bank has against the depositor is that which may be secured by means of the indorsement, and charging him in the usual way as an indorser; and the depositor, on the other hand, is precluded from referring to the instrument specifically, and has only a claim for the debt due him from the bank.[1]

When Deposits Will be Considered as Cash.—An express agreement that the bank shall receive the instrument as money or cash is not necessary; an agreement to this effect may be inferred from the action of the parties, or from the course of dealing between them.[2]

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[1] Nat'l Bank *v.* Burkhardt, 100 U. S., 686; Metropolitan Nat'l Bank *v.* Loyd, 90 N. Y., 530; S C., 25 Hun., 101; Oddie *v.* Nat'l City Bank, 45 N. Y., 735; Clark *v.* Merchants' Bank, 2 N. Y., 380; Levy *v.* Bank of the United States, 1 Binney, 37; Peterson *v.* The Union Nat'l Bank, 52 Penn. St., 206.

[2] Metropolitan Nat'l Bank *v.* Loyd, *supra;* Clark *v.* Merchants' Bank, *supra;* St. L. and S. F. R. R. Co. *v.* Johnston, 23 Blatch., 489.

But when the relation of debtor and creditor in such case is sought to be established from the action of the parties, or the course of their dealings, the facts must be clear and unequivocal, else the inference will be rather that the bank received the instrument as an agent for collection merely.[1] If it has been the uniform practice of the bank to credit checks, &c., deposited by the customer as if they were money, it may be inferred from that practice that a particular instrument of that kind was so deposited and received.[2] But if there is nothing more than the fact that they were received by the bank, and a credit for them entered in the pass-book of the customer, the presumption will be (except in the cases to be mentioned hereafter) that they were received merely for collection.[3] And where the paper is indorsed to the bank "for collection," the presumption is that the customer did not intend that the property in it should pass to the bank, although it may have been the intention that after the collection was made the proceeds should go into the general funds of the bank, and the holder become simply a creditor for the amount.[4]

Where the Instrument is a Check on the Same Bank.—As we have seen above, when the instrument is other than a check drawn upon the bank itself, the inference is rather that it was deposited for collection;

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[1] Kilsby *v.* Williams, 5 Barnewall & Alderson, 816; Boyd *v.* Emerson, 2 Adolphus & Ellis, 184; Scott *v.* Ocean Bank, 23 N. Y., 289; Nat'l Gold Bank *v.* McDonald, 51 Cal., 64.

[2] See cases cited in note preceding.

[3] Nat'l Gold Bank *v.* McDonald, *supra.* Commercial Bank *v.* Miller, 77 Ala., 168.

[4] First Nat'l Bank of Crown Point *v.* First Nat'l Bank of Richmond, 76 Ind., 561.

but in the case of a check drawn on the same bank the inference, according to a court of very high authority, viz., the Court of Appeals of New York, is the other way; and the fact that such a check was delivered to the bank for deposit, and was entered by the proper officer on the pass-book or deposit ticket of the customer, will be sufficient to sustain the presumption that it was received as a deposit of money.[1] The ground for this would seem to be that when a check drawn directly upon the bank itself is presented for deposit the effect is the same as though payment in any other form was demanded; and while the bank has the right to reject the check, or to receive it conditionally, yet if neither of these things is done, but a credit is given for it, the bank in effect pays it, which closes the transaction between the parties.[2] But in a case in the Supreme Court of California this view of the New York court was dissented from, and it was there held that the bank in such case receives a check upon itself as it receives checks upon other banks, presumably to collect the amount for the customer and place it to his credit; and the court said that the rule it intended to lay down is "that when a check on the same bank is presented by a depositor with his pass-book to the receiving teller, who merely receives the check and notes it in the pass-book, nothing more being said or done, this does not of itself raise a presumption that the check was received as *cash*, or otherwise than for collection."[3]

After a check has been deposited and received as

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[1] Oddie *v.* The Nat'l City Bank, 45 N. Y., 735.

[2] *Id.*

[3] Nat'l Gold Bank *v.* McDonald, 51 Cal., 64.

money the bank could not, of course, return it to the depositor and cancel the credit, upon discovering that the drawer had no funds in the bank to meet it. But if the depositor knows that the drawer has no funds in the bank, he can retain no credit given for the check; for in presenting such a check he is deemed to participate in a fraud, from which the law will not permit him to derive any benefit.[1]

Drafts or checks held by banks drawn in their own favor are *prima facie* presumed to have been received on deposit as cash from their customers, and not to have been deposited for collection merely.[2]

Where the Instrument is Not Genuine.—As a general rule, where an instrument is received as money, and it afterwards proves to be a forgery, the bank may (except where the instrument is drawn on the bank itself) cancel the credit given for it; or, if the customer has drawn out the money, may recover the amount from him as money paid under a mistake of fact.[3] But in the case of a check drawn upon itself, the bank is precluded from canceling the credit or recovering the money, and the depositor, if he was ignorant of the forgery, is entitled to the amount; for, like any other drawee, the bank is presumed to know the signature of the drawer, and, having accepted the check as genuine, cannot afterwards dispute its validity as against the depositor.[4]

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[1] Peterson *v.* The Union Nat'l Bank, 52 Penn. St., 206.

[2] Gettysburg Nat'l Bank *v.* Kuhns, 62 Penn. St., 88.

[3] Allen *v.* Fourth Nat'l Bank, 37 New York Superior Court, 137.

[4] Levy *v.* Bank of the United States, *supra;* Allen *v.* Fourth Nat'l Bank, *supra.* For discussion of the subject of the payment of forged instruments see chapter on that subject.

Custom to Credit Conditionally.—In the larger cities, and probably in many smaller places, a custom or usage prevails among the banks, to give merely a conditional credit for checks which are drawn on other banks, which credit is to become absolute after a fixed time, but in the meantime may be canceled, if the checks prove not to be good.[1] Where checks are deposited with reference to such a custom or usage, there can be no question as to the right of the bank to cancel the credit given for them, when they are returned within the prescribed limit of time.[2] But even where

[1] Allen *v.* Fourth Nat'l Bank, 37 N. Y. Superior Court, 137. See also Nat'l Bank *v.* Burkhardt, 100 U. S., 686; Nat'l Gold Bank *v.* McDonald, 51 Cal., 64.

The banks which are members of the Philadelphia Clearing-House have the following notice printed upon the first page of the pass-books which they give to their customers: "In conformity with the rules adopted by all the banks of this city, members of the Clearing-House Association, you are hereby notified that you are held responsible as indorser for the non-payment of all checks upon other banks of this city, members of said association, deposited by you as cash in this bank, until the close of the business day next succeeding that on which such checks are deposited, this bank receiving such checks only for collection on your account through the exchange at the Clearing-House. Upon all other checks and drafts deposited by you as cash, your responsibility as endorser continues until payment has been ascertained by this bank." Merchants' Nat'l Bank *v.* Goodman, 109 Penn. St., 422.

Bankers in London, upon the receipt of undue bills from a customer, do not carry the amount directly to his credit, but enter them short, as it is called; that is, note down the receipt of the bills in his account, with the amount and the times when due, in an inner column of the same page, which sums when received are carried forward into the usual cash column. Giles *v.* Perkins, 9 East, 12.

[2] Allen *v.* Fourth Nat'l Bank, *supra.*

such a custom prevails, the checks may, of course, be deposited and received as money; and whether they were so deposited and received in any given case is a question of fact to be determined from the particular circumstances.[1]

CHAPTER IV.

DEPOSITS FOR SPECIAL PURPOSE.

It frequently happens that deposits are made with a bank for some special purpose, as, for instance, to pay a certain check, or a certain note or other particular indebtedness; and when such a deposit is received by the bank, knowing the purpose for which it is made, the deposit is, in legal phraseology, impressed with a trust, and the bank is bound to use it for that purpose; and if any other disposition is made of the fund, without the assent of the depositor, the bank will be liable for the amount.[2] Thus, if A deposits money to B's account, with directions to appropriate it to the payment of a certain check which has been drawn by B, the bank cannot carry the amount to B's account generally.[3] So, if a bank agree with a depositor that it will apply all sums deposited by him to the payment of certain checks exclusively, it cannot apply any part of such deposit to

[1] Second Nat'l Bank *v.* Burkhardt, 100 U. S., 686.

[2] People *v.* The City Bank of Rochester, 96 N. Y., 582; Parker *v.* Hartley, 91 Penn. St., 465; Wilson *v.* Dawson, 52 Ind., 513; Judy *v.* Farmers' and Traders' Bank, 81 Mo., 464; Straus *v.* Tradesmen's Nat'l Bank, 36 Hun., 451.

[3] Straus *v.* Tradesmen's Nat'l Bank, *supra.*

the payment of the depositor's note of which it is the holder.[1]

The case of Parker *v.* Hartley affords a good illustration of this principle.[2] A, who had sold oil to be delivered in the future, requested H to furnish the amount of the margin which, according to the custom of oil dealers in that locality, A was required to deposit in bank to secure the performance of the contract of sale on his part. H, who was a depositor in the bank, drew his checks for the necessary amount to the order of the cashier, and inserted a memorandum in each check that it was for a margin, specifying the particular contract; and these checks were deposited with the cashier, together with A's counterparts of the agreements between him and the purchasers. Before their expiration the contracts were settled between A and the buyers; but to effect this a considerable part of the margin on one contract was required to be used by A. The residue of the entire amount was then paid to A by the bank. Some time afterwards A became insolvent. H then brought suit against the bank for the amount so paid to A, and it was held that he could recover; for as he had placed the funds at the disposal of the bank for a special purpose, viz., the payment of such sum or sums as A might become liable to pay in event of his failure to comply with the terms of the contracts, the bank had no right to appropriate those funds in any other way.

Depositor may Revoke Directions.—Where a depositor has made a deposit on his own account with directions to apply it to a specific purpose, such direction

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[1] Wilson *v.* Dawson, 52 Ind., 513.

[2] 91 Penn. St., 465.

is regarded as merely an executory order, and, therefore, revocable by him, until the bank, in the pursuance of his directions, has appropriated the money to the purpose designated, so as to be precluded from making any other disposition of it.[1] Therefore, if a customer deposits money to his own account to pay a certain check or note, or a particular creditor, and before the bank makes such application of the money he draws his check for the amount, the bank cannot refuse to honor the check, and it cannot be made liable to a third person for allowing the money to be so drawn out.[2] A good illustration of this principle is afforded by a recent case in Pennsylvania.[3] Higbee & Co. brought suit against the First National Bank of Scranton to recover $600 deposited with it by one Gillespie, in his own name, to pay a draft drawn upon him by the plaintiffs; which amount the bank had shortly afterwards paid out on Gillespie's check, the draft not then being with the bank. The plaintiffs secured a judgment for the amount in the court below, but the Supreme Court reversed this judgment, and held that the plaintiffs had no cause of action against the bank. In the course of his opinion, Paxson, J., said: "The money had not been applied to the draft when Gillespie's check was presented, and could not have been, as the draft was not there. Had the bank failed between the date when the money was deposited and when it was drawn out upon Gillespie's check, the loss would have fallen on him, not on Higbee & Co.

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[1] Williams *v.* Everett, 14 East, 582; Ætna Nat'l Bank *v.* Fourth Nat'l Bank, 46 N. Y., 82; Bank *v.* Higbee, 109 Penn. St., 130; Mayor *v.* Chattahoochee Nat'l Bank, 51 Ga., 325.

[2] See cases cited in preceding note.

[3] Bank *v.* Higbee, *supra.*

The latter had no interest in the money until its application to their draft. An order or direction on the part of Gillespie to so apply it was in its nature revocable up to the moment of its application. Had it been so applied, the power of revocation would have ceased to exist."

Consideration for Agreement of Bank.—The consideration for the agreement by the bank to make a special application of the funds deposited is the deposit itself.[1]

Bank Has no General Lien in Such Case.—As we shall see hereafter, funds deposited for a special purpose known to the bank cannot be withheld from that purpose in order that they may be applied to an indebtedness of the customer to the bank.[2]

Bank as Stakeholder.—A bank not unfrequently receives a deposit in the capacity of stakeholder. The most common instances of this are deposits made by way of margins to insure the performance of contracts.[3] In such cases the agreement is that neither party shall withdraw any part of the deposit without the assent of the other, until the contract between them is fulfilled, or default is made; and the bank is, of course, bound to hold the deposit subject to the terms of this agreement.

There would seem to be no objection to a bank receiving a deposit of this kind.[4] In the case of Bushnell

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[1] Wilson *v.* Dawson, 52 Ind., 513.

[2] See chapter on Banker's Lien.

[3] See Parker *v.* Hartley, 91 Penn. St., 465; Bushnell *v.* Chatauqua County Nat'l Bank, 74 N. Y., 290; S. C., 10 Hun., 378.

[4] Bushnell *v.* Chatauqua County Nat'l Bank, *supra.*

v. The Chatauqua National Bank, Rappallo, J., said: "We are not aware of any such limitation upon the power of banks authorized to receive deposits as would deprive them of the power to receive the deposit of a fund in controversy, to abide the event of a litigation or award, or to become payable upon a contingency to some person other than the depositor. So long as the bank undertakes nothing more than to pay over money deposited with it to the person who may, according to the conditions upon which the deposit was made, become entitled to receive it, we think it does not transcend its power. Nor can it make any difference that the portion of the money deposited which may become payable to a third person is at the time of the deposit uncertain and subject to liquidation."

But even if it were beyond the power of the bank to receive such a deposit, the bank could not set up that fact as a defense in an action brought to recover the amount by the party to whom, according to the terms of the contract, it became forfeited.[1]

If the amount payable to either party out of such a deposit is uncertain or subject to liquidation, the bank may hold the fund until such amount is ascertained, and the bank is entitled before payment to have the amount liquidated in such a manner as to bind all parties.[2] If this liquidation is not made by agreement between the parties entitled to the fund, it must necessarily be made by a competent tribunal whose decision will be binding.[3] The cost of such a proceeding should

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[1] 10 Hun., 378.

[2] Bushnell *v.* Chatauqua County Nat'l Bank, 74 N. Y., 290.

[3] *Id.*

be paid out of the fund. The bank itself, being a mere depositary, would be protected against any costs not unnecessarily and unreasonably occasioned by it.[1]

CHAPTER V.

DEPOSITS IN WHICH THIRD PERSONS HAVE EQUITIES.

A very considerable portion of the deposits with banks is made up of funds in which third persons have a beneficial interest, as, for instance, money deposited by trustees, executors, agents, officers, and other persons occupying fiduciary positions. And where third persons have a beneficial interest in the money or securities deposited, the deposit will be impressed with a trust in their favor, whether it was made in form for the trust account, or simply in the name of the depositor, and for his individual account.[2] On this point the Lord Justice Knight Bruce, in his opinion in the important case of Pennell *v.* Deffell, said: "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as

[1] Bushnell *v.* Chatauqua County Nat'l Bank, 74 N. Y., 290.

[2] Nat'l Bank *v.* Insurance Co., 104 U. S., 54; Van Alen *v.* American Nat'l Bank, 52 N. Y., 1; Farmers' and Mechanics' Nat'l Bank *v.* King, 57 Penn. St., 202; Pennell *v.* Deffell, 4 De G. M. & G., 374; *In re* Hallett's Estate, L. R. 13, Ch. Div., 696.

effectually as the money so paid would have done, had it been specifically placed by the trustee in a particular repository and so remained." And this is the rule, not only where the deposit is made by a trustee, using that word in its more limited sense, but as well where the deposit is made by any person standing in a fiduciary relation to another.[1] Thus, if an agent sell the goods of his principal and deposit the proceeds in bank to his individual account, the credit given him by the bank for the amount will belong in equity to his principal.[2] Nor will it defeat the right of the beneficial owner to claim the deposit that the fiduciary substituted other money for that of such owner;[3] nor that at the same time he deposited the money of his *cestui que trust* he deposited money of his own.[4] It is not essential to the right of a beneficial owner that the bank should have had notice of the trust character of the funds, except to prevent the bank from paying out the amount, or acquiring some right thereto upon the faith that the funds were the individual property of the depositor.[5]

Beneficial Owner can Recover from the Bank.—Where the equitable owner can establish his title to the money, he can recover it of the bank, and the bank cannot set up that there was no privity between it and such owner, for the question is one of title only. The obligations of the bank in this respect are not different

[1] Pennell *v.* Deffell, 4 De G. M. & G., 374; *In re* Hallett' Estate, L. R. 13, Ch. Div., 696.

[2] Van Alen *v.* American Nat'l Bank, 52 N. Y., 1.

[3] Van Alen *v.* American Nat'l Bank, *supra*; *In re* Hallett's Estate, *supra.*

[4] See cases cited in preceding note.

[5] Van Alen *v.* American Nat'l Bank, *supra.*

from those of a private person, and the real owner would have the same right to recover the money from the bank that he would have to recover other property of his in the hands of a third person.[1]

Notice Necessary to Charge the Bank.—While notice to the bank is not necessary in order to protect the rights of the equitable owner when the bank is indifferent between the parties, yet if the bank claims any right of its own in respect to the deposit, or is sought to be charged with having made a wrongful payment of the amount, it must be shown to have had notice of the rights of the *cestui que trust.*[2] Therefore, if a trustee deposits the trust funds in his own name, and the bank acquires a lien thereon upon the faith that the money belonged to the trustee individually, this lien cannot afterwards be defeated by notice that the deposit consisted of trust funds.[3] And if the bank, having no notice of the interest of the beneficiary, pays out the money to one who has apparently the right to receive it, the bank will be protected.[4] In all cases where the bank cannot be charged with notice the rule is, that it is only to the extent of the interest remaining in the depositor that the money can be followed as against the bank having a lawful claim thereto founded upon a consideration.[5] And although the bank may have

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[1] Van Alen *v.* American Nat'l Bank, 52 N. Y., 1.

[2] Nat'l Bank *v.* Insurance Co., 104 U. S., 54; Justh *v.* Nat'l Bank of Commonwealth, 56 N. Y., 478; Viets *v.* Union Nat'l Bank of Troy, 101 N. Y., 564; School District *v.* First Nat'l Bank, 102 Mass., 174.

[3] School District *v.* First Nat'l Bank, *supra.*

[4] Viets *v.* Union Nat'l Bank of Troy, 101 N. Y., 564.

[5] Justh *v.* Nat'l Bank of the Commonwealth, 56 N. Y., 478.

notice of the interest of the *cestui que trust*, yet if by his subsequent acts he clothes the depositor with an apparent ownership or control of the money, the bank will not be liable if it pays the money to the depositor.[1]

What will be Considered as Notice to the Bank.—In general, any circumstance that conveys a clear intimation that the funds are trust funds will be sufficient to charge the bank with knowledge of that fact. In a case where a county officer, who had for a long time kept with his bankers but one account, into which he paid indiscriminately both his own and the county moneys, opened with the same bankers a separate account, headed "Police account," it was said by Sir W. M. James, Lord Justice, that the opening of this account under such a heading "was as clear and distinct a statement that the moneys paid into it (the account) were moneys belonging to the county as if he had put the county moneys into a strong box labelled 'County moneys.'"[2] So, where an executor left with a bank for collection a draft drawn in his favor as executor, and afterwards deposited the proceeds to an account which, by his direction, was opened in his own name, with the addition of the word "Executor," it was held that the bank received the money from the depositor in his fiduciary capacity, and that, having paid the amount to a receiver of the executor's individual property, it was liable for the amount to him in his capacity as executor.[3] And where a husband made a

[1] Dewar *v.* Bank of Montreal, 115 Ill., 22.

[2] *Ex parte* Kingston, L. R., 6 Ch. App., 632.

[3] Scrantom *v.* Farmers' and Mechanics' Bank, 24 N. Y., 424. But see dissenting opinion of Denio, J., in this case. See also Swartwout *v.* Mechanics' Bank, 5 Denio, 555.

deposit of a check drawn to his wife's order, and requested that the deposit be put in her name and to her credit, and that a pass-book be issued in her name for delivery to her, it was held that his request, taken in connection with the fact that the checks had been drawn to her order, fairly disclosed his agency, and that the bank was chargeable with knowledge that the deposit belonged to the wife.[1]

But the mere fact that the title of the fiduciary is added to his name in the heading of the account will not be evidence that the moneys deposited to that account are trust moneys, but such addition will be regarded as nothing more than a description of the person.[2] Accordingly, where an account was opened in the name of the depositor, with the addition of the word "Collector," it was held that this addition afforded no presumption that the funds deposited to that account belonged to the United States.[3] And the same rule was applied where the account stood in the name of the depositor, with the addition "County Treasurer."[4]

CHAPTER VI.

DEPOSITS FOR SAFE-KEEPING.

It is quite a common practice of banks to receive from their customers and other persons certain kinds of property for safe-keeping. As a rule, no charge is

[1] Bates *v.* First Nat'l Bank of Brooklyn, 89 N. Y., 286.

[2] Swartwout *v.* Mechanics' Bank, 5 Denio, 555; Eyerman *v.* Second Nat'l Bank, 84 Mo., 408; S. C., 13 Mo. App., 289.

[3] Swartwout *v.* Mechanics' Bank, *supra.*

[4] Eyerman *v.* Second Nat'l Bank, *supra.*

made for this service, and the only benefit which the bank derives from it is the obligation placed upon the depositor. Deposits of this character are much more common in England than in America. In the former country bankers receive in this way, not only securities and money, but plate, jewels, title-deeds, and important papers, and other valuables of small bulk. But in this country deposits of this sort are usually limited to money, bullion, and paper securities of one kind and another. And although it is a part of the business of banks to receive them, they should be restricted to the kind of property which bankers are in the habit of receiving as depositaries. To adopt the vigorous terms employed by the Supreme Court of Pennsylvania, banks are not to be turned into pawnbrokers' shops, or receive old clothes on deposit.[1]

Special Deposits Incidental to Banking Business.—The receiving of special deposits for safe-keeping is incidental to the business of banking. Special deposits of money, bullion, and plate were the principal, and in some cases the only, deposits received by the early bankers of Europe. Some of our American courts and judges have denied that the receiving of such deposits is a part of a legitimate banking business, as that business is defined by custom and statute in this country;[2] but these decisions and *dicta* have been over-

[1] Lloyd *v.* West Branch Bank, 15 Penn. St., 172. See also Pattison *v.* Syracuse Nat'l Bank, 80 N. Y., 82.

[2] Wiley *v.* Nat'l Bank of Vermont, 47 Vt., 389; Whitney *v.* First National Bank of Brattleboro, 50 Vt., 389; Third Nat'l Bank of Baltimore *v.* Boyd, 44 Md., 47; First Nat'l Bank *v.* Ocean Nat'l Bank, 60 N. Y., 278; Lloyd *v.* West Branch Bank, 15 Penn. St., 172.

ruled by the highest authorities, and it may now be regarded as well settled that receiving deposits of this character is not outside the scope of American banking.[1] Any bank, therefore, may receive such a deposit, unless there is some provision in its charter, or in the banking laws under which it is organized, that either expressly or impliedly forbids it to do so. That the national banks may act as such depositaries was settled by the Supreme Court of the United States in the case of National Bank *v.* Graham;[2] and the power was sustained upon two grounds—first, that it is incidental to the banking business, and secondly, that it is implied in the provision of Section 5228 Revised Statutes, which authorizes an insolvent association to deliver special deposits.

Authority of Officers to Receive Special Deposits.—Of course a bank is not bound to take special deposits, and it will not be liable for the loss of any such deposit received by any of its employés, unless the same was received or retained with the express or implied assent of the officers who have authority to bind the bank in such matters. The mere voluntary act of an officer in so receiving property would not subject the bank to liability;[3] but an express authority from the directors is not necessary. If the bank is accustomed to take such deposits, and this is known to the directors,

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[1] Nat'l Bank *v.* Graham, 100 U. S., 697; Pattison *v.* Syracuse Nat'l Bank, 80 N. Y., 82.

[2] 100 U. S., 697.

[3] First Nat'l Bank of Lyons *v.* Ocean Nat'l Bank, 60 N. Y., 278; Lloyd *v.* West Branch Bank, 15 Penn. St., 172.

and is acquiesced in by them, the bank will be bound.[1] And where the entire management and control of the affairs of the bank are left with one of its officers, then the receiving of a special deposit by him, or by any of his subordinates, with his authority, will be deemed binding upon the bank, as much so as if the directors had expressly given their assent.[2]

The Degree of Care Required.—It is frequently said that the degree of care required of a bank in the keeping of a special deposit is the same as that required of any other gratuitous bailee. Now, while this is a correct statement of an abstract rule of law, it is likely to be misleading, unless coupled with the further statement that in all cases the degree of care due from the depositary depends upon circumstances, such as the nature and quality of the property and the character and customs of the place where it is to be kept. The facilities which the depositary has for taking care of the property are an important factor, and as the facilities of a bank in this respect are usually much greater than those of the generality of people, it would be bound to use what would be better care in the absolute, though not better care relatively. For instance, what might be sufficient care in a merchant might be negligence in a bank, and what might be good care for a bank in a small place might not be such for a bank in a large city. The general rule may be stated thus: *Banks are bound to use such care in the keeping of special deposits as*

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[1] First Nat'l Bank of Carlisle *v.* Graham, 100 U. S., 699; S. C., 79 Penn. St., 106; Pattison *v.* Syracuse Nat'l Bank, 80 N. Y., 82; Foster *v.* The Essex Bank, 17 Mass., 479.

[2] Pattison *v.* Syracuse Nat'l Bank, *supra.*

persons of common prudence in their situation and business usually bestow in the keeping of similar property belonging to themselves.[1] It is not enough to relieve the bank from liability, that it has kept the property of the depositor in the same place or with the same care that it kept its own property, if, in fact, there has been a want of due care. Thus, the fact that property of the bank was stolen at the same time and from the same place is not conclusive that there was sufficient care.[2] Anything less than the amount of care required by law will be considered gross negligence, and if the property is lost through such negligence the bank will be liable for the loss.[3] But what circumstances will constitute gross negligence in any particular case is a question of fact.[4]

Illustrations.—As a general statement of the degree of care required in this matter may not convey a sufficiently definite idea for practical purposes, and this being a question of considerable importance to bankers, it may be worth while to give here a few illustrations of what has been considered gross negligence. In Pattison

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[1] Foster *v.* Essex Bank, 17 Mass., 479; First Nat'l Bank *v.* Ocean Nat'l Bank, 60 N. Y., 278; Pattison *v.* Syracuse Nat'l Bank, 80 N. Y., 82; Lancaster County Nat'l Bank *v.* Smith, 62 Penn. St., 47; Scott *v.* Nat'l Bank of Chester Valley, 72 Penn. St., 471; First Nat'l Bank of Carlisle *v.* Graham, 79 Penn. St., 106; Maury *v.* Coyle, 34 Md., 235; Griffith *v.* Zipperwich, 28 Ohio St., 388; United Society of Shakers *v.* Underwood, 9 Bush, 609; Giblin *v.* McMullen, L. R. 2, P. C., 317.

[2] Pattison *v.* Syracuse Nat'l Bank, 80 N. Y., 82; Griffith *v.* Zipperwich, 28 Ohio St., 388.

[3] See cases cited in note 1.

[4] Griffith *v.* Zipperwich, 28 Ohio St., 388. See also other cases cited in note 1.

v. Syracuse National Bank,[1] a New York case, the plaintiff had left a package of bonds with the bank, and these bonds were lost in some way that could not be made to appear positively; but the bank claimed that they had been stolen from the safe by some person other than the employés of the bank. The evidence did not show any burglary, nor was there any direct explanation of the circumstances of the loss of the bonds; but there was evidence tending to show that, if they were stolen, the theft was committed in the day-time while the bank was open. The testimony showed that the bonds were in a safe so situated as to be accessible to a person entering from the street; that the persons in the bank were so placed that at times the safe was not in their view, and that sometimes the door of the safe was left open. Upon proper directions from the court, the jury found that the bank had been guilty of gross negligence.

In Lancaster County National Bank *v.* Smith,[2] a case which arose in Pennsylvania, the facts were briefly these: Smith, a stranger, called at the bank and left with the teller $3,500 of government bonds for safe-keeping, and retained a memorandum of the numbers and the amounts thereof. The teller put the bonds into an envelope, and placed the envelope in the vault. Afterwards, when the circumstances of the deposit had passed out of the mind of the teller, a person came to the bank and called for the bonds. This person (who was afterwards shown to have been an impostor) gave his name and residence as that of the depositor, and

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[1] 80 N. Y., 82.

[2] 62 Penn. St., 47.

described the bonds accurately; and upon this the teller delivered the bonds to him. The rightful depositor afterwards demanded the bonds, and brought suit for their value. The jury found that there had been gross negligence, and a judgment upon this verdict was sustained by the Supreme Court of the State.

But in another Pennsylvania case, in which a robbery of the bank had been accomplished by a most ingenious device, calculated to succeed with the most careful person, a finding that there had been no negligence was sustained by the Supreme Court.[1]

Liability Where Special Deposit is Stolen by Officer or Agent.—Where a special deposit is lost through the dishonesty of an officer or employé, the bank will not be liable unless it can be shown to have had some knowledge of his dishonest character.[2] The law on this point was very clearly set forth by the Court of Appeals of Kentucky, in the case of Ray's Administrator *v.* Bank of Kentucky.[3] The court, speaking by Judge Lindsay, said: "While the bank must exercise good faith in the selection of its agents and servants, and neither employ nor retain in its employment any person having access to the deposits whose integrity it has reason to question, still, as the depositor knows that the business of the corporation can be transacted in no other way than through the instru-

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[1] De Haven *v.* Kensington Nat'l Bank, 81 Penn. St., 95.

[2] Foster *v.* The Essex Bank, 17 Mass., 479; Scott *v.* Nat'l Bank of Chester Valley, 72 Penn. St., 471; Ray's Administrator *v.* Bank of Kentucky, 10 Bush, 344; Giblin *v.* McMullen, L. R., 2 P. C., 317.

[3] 10 Bush, 344.

mentality of agents and servants, it is not unreasonable to hold that, as the corporation risks their honesty as to such of its property as is intrusted to their keeping, the bailor, who pays no compensation for the services he receives, takes the same risk as to the property deposited. Such diligence and care in the preservation of the deposits as a reasonably prudent person generally exercises in the care and preservation of his own property of like nature, and good faith in the selection of the agents to whom they are intrusted, is as much as a bailor, for whose accommodation deposits are received and held, can conscientiously require.

"Unlike contracts of mandate, which generally imply labor and service, contracts of deposit, and especially such as those under consideration, are in their nature merely passive. If labor or service is to be performed, it is merely incidental, and is not the principal object of the contracting parties. In this case the bank was required to do nothing more than to permit the deposits to remain in its vaults until called for by the depositor. Its cashier was charged with no other duty. It was not expected that he should for any purpose open the package or bag. As to them, his whole duty consisted in using proper care and diligence in closing and fastening securely the doors of the vault and banking-house when business hours were over.

"If he turned aside from the discharge of this negative or passive duty, and assumed to act for himself, clearly outside of the scope of his employment, and opened the package and bag, and appropriated the contents to his own use, then, unless the bank prior to such action had reasonable ground to suspect his integrity, it cannot be made to answer for his said fraud or felony."

What Will Constitute Gross Negligence in Such Case.—But in order to render the bank liable in such case it is not essential that the officer should ever have actually committed any dishonest act. It seems that if his mode of life or his outside connections are such as to greatly tempt him to appropriate to his own use the money and property of others, and this fact is known to his superiors, the retaining him in a position in which he has access to the property of the customer will be gross negligence, and the bank will be liable should such property be stolen by him.[1] Thus, where an assistant cashier, whose means were scant, was known to have been speculating in stocks at various times, and no measures were taken to ascertain whether he had misappropriated any of the special deposits, the bank was held liable for securities of a customer which were found after he had absconded to have been misappropriated and carried away by him.[2] And in a case where bonds left with the bank by a customer were stolen by the teller, the question of gross negligence turned upon the point whether the president had known that the teller was speculating in stocks; and the court said that if the president had discovered that the teller was engaged in any dangerous outside operations, or in buying and selling beyond his evident means, his immediate dismissal would have been called for.[3]

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[1] Scott *v.* Nat'l Bank of Chester Valley, 72 Penn. St., 471; Prather *v.* Kean (U. S. C. C., N. D. Ill., 1887), 29 Fed. Rep., 498.

[2] Prather *v.* Kean, *supra.*

[3] Scott *v.* National Bank of Chester Valley, *supra.*

CHAPTER VII.

DEPOSITS WHEN BANK IS INSOLVENT.

Is a Fraud to Receive Deposits in Such Case.—Where a bank has become irretrievably insolvent, so that there is no longer reason to suppose that it can continue business, the receiving of deposits, after the fact of the insolvency is known to the managing officers, is deemed a gross fraud upon the depositor.[1] In an anonymous case in New York, bankers who had sold a sight draft on London, when they were hopelessly insolvent (their assets being insufficient to pay more than forty per cent. of their indebtedness), were arrested under a provision of the code which authorizes an arrest "when defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought." Upon an appeal from an order denying a motion to vacate the order of arrest, it was held by the Court of Appeals that the order of arrest was properly granted. The court stated the principle as follows: "In the case of bankers, where greater confidence is asked and reposed, and where dishonest dealings may cause wide-spread disaster, a more rigid responsibility for good faith and honest dealings will be enforced than in the case of merchants and other traders. A banker who is, to his own knowledge, hopelessly insolvent cannot honestly continue his business and receive the money of his customers; and although having no actual intent to cheat and defraud

[1] Anonymous, 67 N. Y., 598; Cragie *v.* Hadley, 99 N. Y., 131.

a particular customer he will be held to have intended the inevitable consequences of his act, *i. e.*, to cheat and defraud all persons whose money he receives, and whom he fails to pay, before he is compelled to stop business.''[1]

Depositor May Reclaim Funds in Such Case.— It is a general rule that one who has been induced to part with his property by the fraud of another, under guise of a contract, may, upon discovery of the fraud, rescind the contract and reclaim the property, unless it has come into the possession of a *bona fide* holder. Applying this principle to bank deposits the courts hold that a customer may reclaim funds deposited after the bank has become hopelessly insolvent, it being considered, as we have seen above, a gross fraud on the part of the bank to receive them under such circumstances.[2] In a case of this kind the contract which established the relation of debtor and creditor between the bank and the customer, being vitiated by the fraud, may be avoided by the customer, and he be restored to his original rights as the owner of the funds or their proceeds.[3] And the creditors of the insolvent bank have no equities to have such property applied in payment of the obligations of the bank.[4] But, of course, the right to reclaim

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[1] 67 N. Y., 598. Opinion by Earl, J. It is proper to state that three of the judges concurred in the result only.

The constitution of Missouri makes the officers of a bank personally liable for the deposits which they assent to being received after they know that the institution is insolvent. See Cummings *v.* Winn, 67 Mo., 256.

[2] Cragie *v.* Hadley, 99 N. Y., 131.

[3] *Id.*

[4] *Id.*

may be defeated by the acts or acquiescence of the defrauded party, or because the property has lost its identity and cannot be traced, or because other persons have innocently acquired interests therein in ignorance of the fraud.

Reclaiming Deposit on Ground of Fraud not a Preference.—The reclaiming of a deposit from an insolvent bank, upon the ground that the bank was guilty of a fraud in accepting it, is not a preference within the meaning of statutes which forbid all preferential payments or transfers by an insolvent bank, and provide for a ratable distribution of its assets among its creditors; for in such case the party does not claim under a transfer from the bank, but under his original title, and he does not seek to enforce any right as a creditor of the bank, but merely to reclaim his own property obtained by fraud.[1]

CHAPTER VIII.

PAYMENT OF DEPOSITS.

Time Within Which Bank Must Pay.—Unless there is some contract or understanding to the contrary, the checks of a customer are payable immediately on demand, and the refusal of the bank to so pay a check is a breach of duty, for which an action will lie; but, of course, the bank has a reasonable time within which to ascertain whether it has funds of the depositor out of which payment may be made. The leading case on

[1] Cragie *v.* Hadley, 99 N. Y., 131.

this point is the English case of Marzetti *v.* Williams.[1] The defendants were bankers in London, and the plaintiff kept an account with them. On the evening of December 17th his balance was £69 6*s.* 6*d.* A few minutes before eleven o'clock on the morning of the 19th a further sum of £40 was paid into his account. On the same day, about ten minutes before three o'clock, a check drawn by the plaintiff for £87 7*s.* 6*d.* was presented for payment. The clerk to whom it was presented, after having referred to a book, said there were not sufficient assets, but that it might probably go through the clearing-house. The check was paid on the following day. The action was in tort to recover damages for the refusal to pay the check when it was presented. The jury were instructed that a banker who receives a sum of money from his customer is bound to pay a check drawn by such customer after the lapse of such a reasonable time as would afford an opportunity to the different persons in the establishment of knowing the fact of the receipt of the money; and they were directed to find for the plaintiff if they should be of the opinion that such a reasonable time had intervened between the receipt of the money at eleven o'clock and the presentment of the check at three. The judge observed, also, that it could not be expected if a sum of money was paid to a clerk in a large banking office, and immediately afterwards a check presented to another clerk in a different part of the office, that the clerk to whom the check was presented should be immediately acquainted with the fact of the cash having been paid in, but a reasonable time must be allowed for that pur-

[1] 1 B. & Ad., 415.

pose ; but he told the jury that in forming their judgment, whether such a reasonable time had elapsed, they must consider whether the defendant ought or ought not, between eleven and three o'clock, to have had in some book an entry of the £40 having been paid in, which would have informed all their clerks of the state of the account. The jury found for the plaintiff.

Customer May Recover Though No Actual Damage Shown.—In Marzetti *v.* Williams the plaintiff did not show that he had sustained any special damage, but the Court of King's Bench, upon a rule for a new trial, held that he was clearly entitled to nominal damages. The Chief Justice, Lord Tenterden, placed his judgment on the ground that the action was "founded on a contract between the plaintiff and the bankers, that the latter, whenever they should have money in their hands belonging to the plaintiff, or within a reasonable time after they should have received such money, would pay his checks ; and there having been a breach of such contract, the plaintiff is entitled to recover nominal damages." In the subsequent case of Rolin *v.* Stewart,[1] which was an action brought by a firm of traders against their bankers for dishonoring their checks when they had sufficient funds on deposit to meet the checks, it was held that the plaintiffs could recover substantial damages, though they introduced no evidence to show that they had sustained any special damage. It was said by Williams, J. : "I think it cannot be denied that, if one who is not a trader were

[1] 14 C. B., 595. The verdict in this case was for £500 damages, but it is inferred that this amount was afterwards reduced by agreement of counsel.

to bring an action against a banker for dishonoring a check at a time when he had funds of the customer's in his hands sufficient to meet it, and special damages were alleged and proved, the plaintiff would be entitled to recover substantial damages. And when it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury, in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract, just as in the case of an action for a slander of a person in the way of his trade, or in the case of an imputation of insolvency in a trader, the action lies without proof of special damage."

Order of Payments.—It is the general rule in the payment of running bank accounts that the deposits are presumed to be drawn out in the order in which they were made. It is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side.[1] In the leading case on this point the customer sought to travel back into the account several years in order to charge the estate of a deceased partner in the banking firm with a balance due him. But the Master of the Rolls refused to allow such a remolding of the account, and held that an ordinary banking account should be settled upon the same principles as other accounts current, viz., the principles stated above.[2]

But the general rule, that the first drawings out are

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[1] Clayton's Case, 1 Mer., 572.

[2] *Id.*

to be attributed to the first payings in, will not be applied where a fiduciary has deposited trust funds with money of his own to his individual account; but he will be deemed to have drawn out his own money in preference to the trust moneys, no matter in what order the deposits were made.[1]

Statute of Limitations.—In England it is held that as money deposited with a banker by his customer in the ordinary way is money lent to the banker, with a superadded obligation that it is to be paid when called for by check, the statute of limitations is a bar to its recovery if it remains in the banker's hands for six years without any payment by him of the principal or allowance of interest.[2] But the American courts hold differently. In this country it is the well-settled rule that the statute of limitations does not begin to run against the depositor until he has made due demand of payment;[3] for as the engagement of the bank is not to pay absolutely and immediately, but when proper demand is made, the bank is not in default and no cause of action arises before payment has been demanded and refused.[4]

There are certain exceptional cases in which a demand is dispensed with, as where a bank has stopped payment and closed its doors, or has claimed the deposit

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[1] *In re* Hallett's Estate, L. R., 13 Ch. Div., 696, overruling in this point Pennell *v.* Deffell, 4 De G. M. & G., 374.

[2] Pott *v.* Clegg, 16 M. & W., 321.

[3] Girard Bank *v.* Bank of Penn Township, 39 Penn. St., 92; Johnson *v.* Farmers' Bank, 1 Harr., 117; Thomson *v.* The Bank of British North America, 82 N. Y., 1.

[4] Downes *v.* Bank of Charlestown, 6 Hill, 297.

as its own in an account rendered to the depositor ; and in such cases the statute begins to run from the time the depositor has notice of the fact which dispenses with the demand.[1]

But a demand for the whole balance of deposit is not requisite to enable the depositor to maintain suit against the bank. Whenever a demand is made, by presentation of a genuine check in the hands of a person entitled to receive its amount for a portion of the sum on deposit and payment is refused, a cause of action immediately arises, and as to the amount specified in the check the statute of limitations begins to run from that time.[2]

Payment of Canceled and Stale Checks and Checks not Due.—If a bank pays a check which has been canceled, or to which the drawer has a defense, under circumstances which ought to have excited the suspicion of the bank officers and prompted them to make inquiries before paying it, the amount thereof cannot be charged to the depositor.[3] In the English case of Scholey *v.* Ramsbottom the depositor, having drawn a check, found the amount incorrect, and tore the instrument into four pieces and threw them away. Some unknown person took these four pieces and neatly pasted them together upon another slip of paper and presented the check for payment. The rents were quite visible, and the face of the check was soiled and dirty ;

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[1] Bank of Missouri *v.* Benoist, 10 Mo., 519; Watson *v.* Phenix Bank, 8 Metc. (Mass.), 217 ; Farmers' Bank *v.* Planters' Bank, 10 G. & J., 422.

[2] Viets *v.* Union Nat'l Bank of Troy, 101 N. Y., 564.

[3] Scholey *v.* Ramsbottom, 2 Camp., 485 ; The Lancaster Bank *v.* Woodward, 18 Penn. St., 357.

but it was paid by the bankers without making any inquiries. Lord Ellenborough was of the opinion that under these circumstances the bankers should not have paid the check, and the jury found in favor of the depositor.

Banks should use great circumspection in paying checks long overdue, for the debt for which the check was given may have been otherwise discharged, or the drawer may have some other defense to the instrument. It is impossible to name any particular time when a check becomes so old that the bank paying it does so at the risk of letting in any defenses that the drawer may have; this must necessarily depend upon the circumstances of each case. In Lancaster Bank *v.* Woodward [1] the bank paid a check more than a year after its date, and when the drawer had not sufficient funds on deposit to meet it. Upon these facts it was held that the bank could not recover the amount from the depositor. In the course of the opinion in this case it was said by Woodward, J.: "Checks are no doubt often negligently retained and presented long after they should be, but when a bank sees that a customer appointed a day in his check for its payment, that that day has long since passed, and that no funds have been deposited to meet it, the bank must be held to the rule in regard to other overdue paper, and be presumed to have taken it on the credit of the indorser. These circumstances are sufficient to put the bank on inquiry, and therefore they are not to be regarded as innocent indorsees without notice."

It is improper to pay a check before the day on which it bears date. In De Silva *v.* Fuller the plaintiff was

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[1] The Lancaster Bank *v.* Woodward, 18 Penn. St., 357.

holder of a check drawn on the defendants, who were bankers, dated the 18th June. On the 17th he lost the check, and on the same day the check was presented to the defendants, and was paid by them. It being shown to be contrary to the usual course of business to pay drafts before the day on which they were dated, the plaintiffs were allowed to recover.[1] Although this case was decided as long ago as 1776, the question does not appear to have been determined in any subsequent case, probably because this rule of the law merchant is universally known to bankers and business men, and is always conformed to.

Where Deposit is Claimed by Different Persons.—As we have seen elsewhere, money deposited in bank may be followed by the true owner, though the depositor made the deposit to his individual account and without notice to the bank of the real ownership.[2] "As between the bank and the depositor, while the fund is still held by the bank, and it has not been misled by the apparent ownership induced by the state of the account to pay it out, or to incur responsibility for it to others by its own act or by the act of the law, the ownership of the fund can be shown to be different from the apparent ownership by the entry in the book."[3] As the courts recognize the right of the real owner to the deposit, it would be improper for the bank to pay the money to the depositor after having had notice of such ownership; and if it does so pay out the money after receiving due

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[1] Chitty on Bills (Sel. Cas.), 392.

[2] See chapter on Equities of Third Persons.

[3] Per Agnew, J., in Stair *v.* York Nat'l Bank, 55 Penn. St., 364.

notice, it will be liable to the real owner.[1] Accordingly, where an agent procured the note of his principal to be discounted, and deposited the proceeds to his own credit, and the bank, after being notified by the principal that the funds belonged to him, paid checks to the agent, it was held that the principal could maintain an action against the bank for the amount paid out after such notice.[2] The court, by Rogers, J., observed: "It is true that until the bank has notice they may consider the agent as the owner of the funds; but when they are informed the money belongs to the principal, they are, as in justice they should be, placed in a different situation. They are stakeholders for the owner, and must at their peril pay it to him; and to protect themselves they may require an indemnity." Whenever, therefore, there are conflicting demands and the bank stands in the position of a stakeholder, its only safe course before making payment to either claimant is to demand a bond or other form of indemnity to protect it from any loss.[3] Or before making payment, the bank may insist that the question of ownership be determined by some competent tribunal, whose decision would be binding upon all the parties.[4] And the bank would be protected from all costs of such a proceeding not unnecessarily or unreasonably occasioned by it.[5]

Cashing Checks Drawn on Other Banks.—It is a part of a legitimate banking business to cash checks or drafts drawn on other banks, whether this is regarded

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[1] Frazier *v.* The Erie Bank, 8 W. & S., 18.

[2] *Id.*

[3] Stair *v.* York Nat'l Bank, 55 Penn. St., 364.

[4] Bushnell *v.* Chatauqua Nat'l Bank, 74 N. Y., 290.

[5] *Id.*

as the making of a collection for the account of the customer, or as a loan or advance made on the faith of the instrument.[1] This is a question which has not often arisen for adjudication, being too plain for any controversy. But it does appear to have been raised in a small case in the Court of Common Pleas of New York City, where the point was determined as above stated.[2]

Bank not Required to see to the Application of Trust Moneys.—A bank is not bound to inquire when it pays the checks of one whom it knows to be a fiduciary, whether he is in the course of lawfully performing his duties as such, but this it is bound to presume.[3] In the case of Gray *v.* Johnson, Lord Chancellor Cairns observed: "The result of the authorities is clearly this, in order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, there must, in the first place, be some misapplication, some breach of trust, intended by the executor, and there must, in the second place, as was said by Sir John Leach, in the well-known case of Keane *v.* Roberts, be proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that I think I may safely add, that if it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed." The depositor in the case referred to was

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[1] Murray *v.* The Bull's Head Bank, 3 Daly, 364.

[2] *Id.*

[3] Gray *v.* Johnston, L. R. 3, H. L. 1; Keane *v.* Roberts, 4 Madd., 357; Goodwin *v.* Bank of America, 48 Conn., 550.

an executor, but what was said by the Lord Chancellor is equally applicable to the case of any other fiduciary

Overdrafts.—The practice of allowing overdrafts has been emphatically disapproved by several eminent judges. In the case of Lancaster Bank *v.* Woodward,[1] it was said by Woodward, J.: "It was attempted to prove a custom to pay overdrafts of solvent dealers with banks, but it failed; and if it had not failed, such a custom should be abolished. *Malus usus abolendus est.* Our banking institutions are generally conducted by the boards of directors, to whom stockholders look for the proper use and management of the capital invested; whilst the ordinary routine of daily business is intrusted to the cashiers and clerks, who are not directors, generally not stockholders, and who have no power to discount paper. If these subordinate officers might pay checks, which are properly drafts on funds deposited, when there were no funds of the drawer on deposit, the capital of banks would be liable to perversion to purposes and in modes that were never contemplated either by the legislature or the stockholders. That the practice of paying overdrafts has prevailed to some extent is quite likely; and it may be true that boards of directors have in some instances sanctioned it, but it has no authority in sound usage or in law. The more nearly these institutions keep in the line of regular business transactions, the more effectually will they accommodate the public and secure their own interests."

Likewise, Justice Story, in Minor *v.* Mechanics' Bank,[2] condemned the practice in very strong language, and

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[1] 18 Penn. St., 357.

[2] 1 Peters, 46.

said it was a practice which could not receive any countenance in a court of justice. So, an eminent Maryland judge observed that the customers of the public banks of that State had no accommodation credit, and that the officers of those institutions could not, without gross violation of their trust, honor any checks or drafts beyond the amount of deposits standing to the credit of the drawers.[1] And similar views were expressed not long since by the St. Louis Court of Appeals.[2]

But notwithstanding the sweeping language used in the cases cited, they are none of them authorities for the broad proposition that it is improper to allow an overdraft in any event, for either this point was not directly involved in the case, or there were other elements present, which would have rendered the particular transactions improper, even though overdrafts of themselves be not objectionable. In Bank of Albany *v.* Ten Eyck,[3] Earl, Commissioner, observed: "It is not an uncommon thing for bankers to permit overdrafts, with the understanding that the account should be made good before the close of banking hours on that day or soon after; and whether such overdrafts are prudent or not depends upon the character and standing of the drawer, and upon the circumstances of each case." And in some of the English cases it appears to be assumed that overdrafts may properly occur in the ordinary course of the dealings between banks and their customers.[4] Perhaps the true rule is this: that whether

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[1] Eichelberger *v.* Finley, 7 Harr. & Johns., 381, per Dorsey, J.

[2] Market Street Bank *v.* Stumpe, 2 Mo. App., 540.

[3] 48 N. Y., 305.

[4] See, for instance, Waterlow *v.* Sharp, L. R., 8 Eq., 501.

it is improper to allow an overdraft depends entirely upon the facts of the case, and whether, taking all the surrounding circumstances into consideration, it is reasonable and prudent.

CHAPTER IX.

PAYMENT OF CUSTOMERS' NOTES AND ACCEPTANCES.

It is the well-settled rule in England that when a customer makes his paper payable at his banker's, this is tantamount to an order to the banker to pay it out of the money of the customer on deposit.[1] And this is also the general rule in America. It is true that in several cases judges have said that the bank would not be authorized to pay without an express order or request from the customer;[2] but the great weight of authority is the other way.[3] In New York it has been said: "An acceptance or promissory note thus payable is, if the party is in funds, that is, has the amount to his credit, equivalent to a check, and is in effect an order or draft on the banker, in favor of the holder, for the amount of the note or acceptance."[4] And in another case in that

[1] Foster *v.* Clements, 2 Camp., 17; Robarts *v.* Tucker, 16 Q. B., 500; S. C., 4 E. L. & E., 236.

[2] Scott *v.* Shirk, 60 Ind., 160; Wood *v.* Merchants' Sav., Loan, & Trust Company, 41 Ill., 267; Ridgeley Nat'l Bank *v.* Hamilton, 109 Ill., 479.

[3] Commercial Bank *v.* Hughes, 17 Wend., 94; Ætna Nat'l Bank *v.* Fourth Nat'l Bank, 46 N. Y., 82; Indig *v.* Nat'l City Bank, 80 N. Y., 100; Commercial Nat'l Bank *v.* Henninger, 105 Penn. St., 496; Home Nat'l Bank *v.* Newton, 8 Bradwell, 563.

[4] Ætna Nat'l Bank *v.* Fourth Nat'l Bank, *supra.*

State it was said: "A note payable at a bank where the maker keeps his account is equivalent to a check drawn by him upon that bank, except that in the case of a note the failure to present for payment does not discharge the maker."[1] In a recent case in the Supreme Court of Pennsylvania, Paxson J., after quoting the above extract from the opinion in Ætna National Bank *v.* Fourth National Bank, said: "I do not understand this principle to be disputed. The note, therefore, was a draft on the bank against the deposit of the maker. It was the equivalent to a peremptory order on the bank to pay, or, to speak more accurately, to charge the notes against the deposit."[2] And in a very able opinion by Wilson, J., in the Appellate Court for the First District of Illinois, it was said: "As it is the duty of the bank to pay customers' checks when in funds, so at least it has authority, if it is not under actual obligation, to pay his notes and acceptances made payable at the bank."[3]

Whether Bank is Bound to Apply Funds.— While there would seem to be little doubt that banks *may* pay the notes and acceptances of their customers without any express direction, it is not equally clear whether they are *required* to do so. If the note or acceptance is to be regarded as an order to pay, or as equivalent to a check, then the bank would seem to be under an obligation to pay it. But there does not appear to be any case in which this has been expressly

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[1] Indig *v.* Nat'l City Bank, 80 N. Y., 100.

[2] Commercial Nat'l Bank *v.* Henninger, 105 Penn. St., 496.

[3] Home Nat'l Bank *v.* Newton, 8 Bradwell, 563.

held to be a duty which the bank owes to its customer.[1] There are a number of cases in which it has been decided that the bank is not under an obligation to pay, even where it has the right to do so; but in all these cases the bank was itself the holder of the bill or note, and its rights and duties were those of a creditor, and not those of an agent to pay, and like any other creditor, it was not obliged to set off the one debt against the other, unless it saw fit to do so.[2]

But what is said in this section is of general application only as between the bank and the principal debtor on the instrument; in some States, as we shall see in the next section, a different rule obtains where the rights of indorsers and sureties intervene.

Duty of Bank to Collect From Principal Debtor.—It is a well established equitable principle in many jurisdictions that a creditor who has the means of collecting the debt from the principal debtor, or out of his property, ought, in justice to a surety, to avail himself of those means, and that if he fails to do this, and

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[1] Whitaker *v.* The Bank of England (6 C. & P., 700) is sometimes cited as an authority for the proposition that a bank is obliged to pay the acceptances of its customer made payable there, and that for failing so to do it will be liable to him for damages. But in this case there was an express understanding between the bank and the customer that the bank would pay his acceptances, upon certain conditions. And it appears that it is the general practice of English bankers to make provision for paying the acceptances and promissory notes of their customers in the table of printed terms upon which they deal with persons who keep accounts with them.

[2] Marsh *v.* Oneida Nat'l Bank, 34 Barb., 298; Citizens Bank *v.* Carson, 32 Mo., 191; Second Nat'l Bank *v.* Hill, 76 Ind., 223.

surrenders up the means of so making the debt, he discharges the surety. Applying this principle where a bank is the holder of an obligation on which a depositor is the principal debtor, the courts of several States have ruled, that if a bank has funds of the depositor which it may apply to the payment of the instrument at its maturity, and does not do so, but allows the depositor to draw them out, that this discharges the indorsers and all parties to the instrument who are merely sureties.[1] This principle was acted upon by the Supreme Court of Pennsylvania in a recent case.[2] The facts, as briefly stated by Paxson, J., were these: "The defendant was the indorser of the notes in suit. The maker was B. F. Young, who was also the cashier of the bank. The notes had been discounted by the bank, and were payable there. On the day they matured, at the close of banking hours, there was on deposit to the credit of Mr. Young a balance sufficient to meet the notes. Instead of charging up the notes against the deposit, the cashier handed them to a notary for protest. The object of this was to hold the indorser, and compel him to proceed against the maker in order to let in a defense which the maker could not set up against the bank. The defendant contends that the failure of the bank to charge up the notes against Mr. Young's deposit relieved him as indorser." The grounds upon which the court based its decision sufficiently appear in the following extracts from the opinion: "When the depositor becomes indebted to the bank on one or more accounts,

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[1] Commercial Nat'l Bank *v.* Henninger, 105 Penn. St., 496; McDowell *v.* Bank of Wilmington and Brandywine, 1 Harrington (Del.), 369; Dawson *v.* Real Estate Bank, 5 Ark., 283.

[2] Commercial Nat'l Bank *v.* Henninger, *supra.*

and such debts are due and payable, the bank has the right to apply any deposit he may have to their payment. This is by virtue of the right of set-off. Where a general deposit is made by one already indebted to the bank, the latter may appropriate such deposit to the payment of such indebtedness. This results from the general doctrine of the application or appropriation of payments. And it may be safely asserted, that as a general rule the former may waive the right to make such application, and allow the depositor to draw out his balance. Where, however, the rights of third persons intervene, the case is sometimes different. * * * The bank being indebted to Young when his notes matured in an amount exceeding the notes, the latter had the clear right to set-off so much of his deposit as was necessary to meet the notes. The defendant as surety was entitled to avail himself of Young's right. It may be illustrated thus: If I am the holder of A's note, indorsed by C, and when the note matures I am indebted to A in an amount equal to or exceeding the note, can I have the note protested and hold C as indorser? It is true, A's note is not technically paid, but the right to set-off exists, and surely C may show, in relief of his obligation as surety, that I am really the debtor instead of the creditor of A. If this is so between individuals, why is it not so between a bank and individuals?"

This principle, that a surety will be discharged by the failure of the bank to pay the obligation out of the principal debtor's deposit, has likewise been acted upon in Delaware.[1] And the New York Court of Appeals,

[1] McDowell *v.* Bank of Wilmington and Brandywine, 1 Harrington, 369.

in the case of Bank of Fishkill *v.* Speight, appears to have assumed that this would be the rule, unless for some reason the deposit is inapplicable to the purpose.[1] But in Indiana it has been held that a surety has no right to insist that the bank shall pay the instrument out of the deposit of the maker or acceptor.[2] And this view is probably the more consistent with the rules which in most States govern the relation between the holder of negotiable paper and the sureties thereon.[3]

But the rule that the bank owes to the surety the duty of paying the obligation out of the deposit of the maker or acceptor cannot apply where the deposit is special, or where there is some understanding between the bank and the depositor that the note or bill is a matter of itself, and not to be included in the general account between them.[4] Thus, in the above-cited case of Commercial Bank *v.* Henninger, the court said: "It must be conceded that if the deposit had been special, or if, previous to the maturity of the note, an arrangement had been made between the depositor and the bank, by which the bank had been forbidden to apply the money in its hands to the payment of these notes, the indorser would not be discharged."[5] In National Bank of Fishkill *v.* Speight, the New York Court of Appeals held: "If before the maturity of paper held by

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[1] 47 N. Y., 668.

[2] Second Nat'l Bank *v.* Hill, 76 Ind., 223.

[3] See Glazier *v.* Douglas, 32 Conn., 393.

[4] Nat'l Bank of Fishkill *v.* Speight, 47 N. Y., 668; People's Bank of Wilkes-Barre *v.* Legrand, 103 Penn. St., 309; Nat'l Mahaiwe Bank *v.* Peck, 127 Mass., 302; Martin *v.* Mechanics' Bank, 6 H. & J. (Md.), 271.

[5] 105 Penn. St., 496.

a bank against a depositor an arrangement is made by which the bank agrees to hold the deposit for a specific purpose, and not to charge the note against it, the bank may be regarded as a trustee, and the deposit special. In such a case, in the absence of fraud or collusion, an indorser upon such paper has no right to require the application of the deposit towards the payment of the paper upon its maturity." And upon this same general principle the Supreme Court of Massachusetts, in National Mahaiwe Bank *v.* Peck, ruled that: "Where, by express agreement, or by a course of dealing between a bank and one of its depositors, a certain note of the depositor is not included in the general account between them, any balance due from him to the bank when the note becomes payable is not to be applied in satisfaction of the note, even for the benefit of the surety thereon, except at the election of the bank." And it may be said in general, that the surety will not be released unless the principal debtor has funds sufficient to pay the obligation on deposit at the time of its maturity; the fact that he deposits funds sufficient for the purpose subsequent to that time will not effect this result.[1]

Certification of Notes and Acceptances.—When paper payable at a bank is presented by an individual the money is ordinarily paid upon it and the paper is left with the paying bank. But when it is presented through another bank in the same place, the usual custom is for the bank at which it is payable, instead of actually paying the money upon it, to certify it as good,

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[1] Nat'l Bank of Newburgh *v.* Smith, 66 N. Y., 271; Voss *v.* German American Bank, 83 Ill., 599; Martin *v.* Mechanics' Bank, *supra.*

in the same manner that checks are certified, and it is then taken back to the presenting bank, and is included in the general settlement of that day or the next. The legal effect and force of such a certificate is that the maker has funds in the bank applicable to the payment of the instrument, and that the bank will hold the same for that purpose, and will pay the amount on request. It is equivalent to the payment of the instrument by the maker, and the substitution of the certifying bank as the debtor for the amount thereof. The obligations and liabilities of the bank are not different in such case from what they are where the instrument certified is a check, and the rules which apply to certified checks are equally applicable to certified bills and notes.[1]

CHAPTER X.

PAYMENT UPON FORGED AND ALTERED ORDERS.

The law imposes upon the bank the duty of ascertaining the genuineness of the depositor's orders, and if it pays upon an order which is not genuine the amount cannot be charged against the depositor's account.[2]

[1] Meads *v.* Merchants' Bank, 25 N. Y., 143. Irving Bank *v.* Wetherald, 36 N. Y., 335. For the rules governing certification of checks, see chapter on that subject.

[2] Crawford *v.* West Side Bank, 100 N. Y., 50; Levy *v.* Bank of the United States, 4 Dall., 234; S. C., 1 Binney, 27; Belknap *v.* Nat'l Bank of North America, 100 Mass., 379; Nat'l Bank of North America *v.* Bangs, 106 Mass., 441; First Nat'l Bank *v.* Tappan, 6 Kans., 466; Hall *v.* Fuller, 5 B & C., 750.

In the English case of Hall *v.* Fuller[1] it was said by Bailey, J.: "If the banker unfortunately pays money belonging to the customer upon an order not genuine he must suffer, and to justify the payment he must show that the order was genuine, not in the signature only, but in every respect." The principles upon which this obligation rests were very clearly explained by the present Chief Judge of the New York Court of Appeals, in the case of Crawford *v.* West Side Bank:[2] "The relation existing between a bank and its depositor," said that learned judge, "is, in a strict sense, that of debtor and creditor; but in discharging its obligation as a debtor the bank must do so subject to the rules obtaining between principal and agent. In disbursing the customer's funds it can pay them only in the usual course of business and in conformity to his directions. In debiting his account it is not entitled to charge any payments except those made at the time when, to the person whom, and for the amount authorized by him. It receives the depositor's funds upon the implied condition of disbursing them according to his order, and upon an accounting is liable for all such sums deposited as it has paid away without receiving valid direction therefor. The bank is from necessity responsible for any omission to discover the original terms and conditions of a check once properly drawn upon it, because at the time of payment it is the only party interested in protecting its integrity who has the opportunity of inspection, and it therefore owes the duty to its depositors of guarding the fund intrusted to it from spoliation. This liability arises, although an alteration of a

[1] 5 B. & C., 750.
[2] 100 N. Y., 50.

material part of his order has been effected, even though it be done so skillfully as to defy detection by examination. This follows from the fact that after it is put in circulation it passes from beyond the reach of its maker, who has no opportunity until after it has fulfilled its office of inspecting it and protecting himself from the loss occasioned by a fraudulent alteration. This opportunity the banker has, and he is responsible for any want of vigilance in detecting the alteration of an order after it has once been correctly drawn, with its blank spaces properly filled up, and is put in circulation by the maker." And in the course of this opinion it was also observed that the questions arising on such paper between the bank and the depositor "always relate to what the one has authorized the other to do. They are not questions of negligence or of liability of parties upon commercial paper, but are those of authority solely."

When Depositor is Negligent Loss Must Fall on Him.—But the rule which casts the loss upon the bank, when it pays upon an order which is not genuine, is not applied indiscriminately and regardless of the circumstances. If both parties are innocent, and there is no negligence, the bank must suffer the loss. But where the depositor, by his conduct, has misled the bank, or has neglected to exercise the degree of care which the law requires of him, he will not be heard to question the genuineness of the instrument.[1] Accord-

[1] Leather Manufacturers' Nat'l Bank *v.* Morgan, 117 U. S., 96; Hardy *v.* Chesapeake Bank, 51 Md., 562; Dana *v.* Nat'l Bank of the Republic, 132 Mass., 158; De Feriet *v.* Bank of America, 23 La. Ann., 310; Young *v.* Grote, 4 Bing., 253.

ingly, where a depositor having been shown a check which had been forged by his confidential clerk, said he had not signed it, but declined to say it was a forgery, and after having had an interview with the clerk, reported to the bank that it was all right, and continued the clerk in his employ, it was held that, having by his approval and ratification of the first forgery misled the bank and thrown it off its guard, he was precluded from holding it liable for paying a second check forged by the clerk, which was drawn in all respects similar to the first.[1] So, if the customer has failed to bestow upon the examination of his bank-book and vouchers the degree of care which the law imposes upon him, he may be estopped from disputing the genuineness of a check included in that account.[2] And upon the same principle, if the customer sends forth a check filled out in such a manner as to invite an alteration in the amount, he may be held by the bank for the sum to which the check has been raised.[3]

The frequently cited English case of Young *v.* Grote affords an excellent illustration of the last-mentioned application of this principle. A customer of a bank, on leaving home, intrusted to his wife several blank forms of checks signed by himself, and desired her to fill them up according to the exigency of his business. She filled up one with the words "*fifty-two pounds two shillings*," beginning the word "fifty," with a small letter in the

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[1] De Feriet *v.* Bank of America, 23 La. Ann., 310.

[2] Leather Manufacturers' Nat'l Bank *v.* Morgan, 117 U. S., 96; Hardy *v.* Chesapeake Bank, 51 Md., 562. As to the amount of care due from the depositor in this matter see chapter on The Bank-Book.

[3] Young *v.* Grote, 2 Bing., 253.

middle of a line. The figures "52 : 2" were also placed at a considerable distance to the right of the printed "£." She gave the check thus filled up to her husband's clerk to get the money. The clerk, before presenting it, inserted the words "three hundred" before the word "fifty," and the figure "3" between the printed "£" and the figures "52 : 2," so that the instrument then had the appearance of a check in the regular form for three hundred and fifty-two pounds and two shillings, and this amount the bankers paid upon it. Upon these facts, the court held that the customer must bear the loss, the forgery having been invited by the improper mode in which the check was filled up.

Forged Indorsement of Payee.—Where the instrument is drawn payable to the order of the payee, the bank is bound to ascertain the genuineness of the payee's indorsement ; and if it pays upon a forged indorsement, it cannot discharge itself in account with the customer ; for the only authority which the customer has conferred upon it is to pay on the order of the person whom he has named.[1] And although the person to whom the payment is made has the rightful possession of the instrument, yet the bank is not authorized to pay the same to such person without the genuine indorsement of the payee.[2] If the bank relies upon false representations as to identity of the payee, for which neither the drawer nor the payee is responsible, it makes payment at its peril.[3] And no custom or

[1] Robarts *v.* Tucker, 16 Q. B., 500; Morgan *v.* Bank of the State of New York, 11 N. Y., 404; Welsh *v.* German American Bank, 73 N. Y., 424.

[2] Dodge *v.* Nat'l Exchange Bank, 30 Ohio St., 1.

[3] *Id.*

usage among bankers as to the mode of ascertaining the identity of the person indorsing the name of the payee will relieve the bank from loss should the indorsement be a forgery.[1]

When the Amount may be Charged Against the Depositor.—Where a check which has had a legal inception, that is to say, was a valid instrument when put in circulation, is afterwards altered in amount, the bank may charge the drawer with the sum for which it was originally drawn.[2] But if it has been vitiated by alteration before it could take effect as a valid and complete instrument, then the bank cannot hold the depositor for anything paid on it.[3] Thus, where an employer, intending to be absent from his place of business for a few days, drew his check and post-dated it, and left it with a clerk with instructions to draw the money at the proper time, to pay the wages of the workmen, and the clerk, before the date when the check was to take effect, took it and changed the date and drew the money upon it, it was decided that the bank could not, by holding the check until its proper date, charge the depositor with the amount; for the possibility that the instrument could ever become a legal liability was destroyed by the fraudulent alteration.[4]

Bank Cannot Recover Money Paid on Forged Signature.—It is an elementary rule in the law of commercial paper that the drawee is presumed to know

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[1] Dodge *v.* Nat'l Exhange Bank, 30 Ohio St., 1.
[2] Hall *v.* Fuller, 5 B. & C., 750.
[3] Crawford *v.* West Side Bank, 100 N. Y., 50.
[4] *Id.*

the signature of the drawer; and if he pays a bill to which the drawer's name has been forged he is bound by the act and cannot recover the money. The law proceeds upon the theory that the drawee must know the signature of his correspondent much better than the holder can, and that, therefore, the holder may cast upon him the entire responsibility of determining as to the genuineness of the instrument. If he fails to discover the forgery the law imputes to him negligence, and although he has made the payment under a mistake, and parts with his money without receiving the supposed equivalent, and although the holder has obtained the money without consideration, still the drawee cannot be relieved from the consequences of his neglect at the expense of the holder, and the latter may retain the money in equity and good conscience. This rule has been held to apply with peculiar force to bankers in the payment of checks, for the special purpose of a deposit is that it may be drawn against, and bankers have a better opportunity, and more reason, to know the signatures of their depositors than a drawee has to know the signature of a correspondent whose bills are drawn less frequently. And, therefore, if a bank makes payment to a *bona fide* holder, upon a check to which the name of a depositor has been forged, it cannot recover the money so improperly paid.[1]

But the doctrine that the drawee cannot recover money paid by him upon the forged signature of the

[1] Levy *v.* Bank of the United States, 4 Dallas, 234; S. C., 1 Binney, 27; Nat'l Park Bank *v.* Ninth Nat'l Bank, 46 N. Y., 77; Bank of St. Albans *v.* Mechanics' Bank, 10 Vt., 141; Commercial & Farmers' Nat'l Bank *v.* First Nat'l Bank, 30 Md., 11.

drawer applies in strictness only where the paper is actually presented to the party, and accepted or paid on or after such presentation. Where the payment is made without presentation and subject to future examination of the paper, the case is not within this rule. Accordingly, if a bank pays without having had an opportunity to inspect the paper, it will not be precluded from recovering back the money paid, unless its neglect to give notice of the forgery within due time has misled the other party to his injury.[1]

But May Recover Where Fault is With Other Party.—And this rule presupposes that the holder has acted in good faith and has not neglected any duty which he owed the bank in the matter. In Ellis *v.* Ohio Life Insurance and Trust Company,[2] a case frequently referred to, it was said by the Supreme Court of Ohio: "To entitle the holder to retain money obtained by mistake upon a forged instrument, he must occupy the vantage ground by putting the drawee alone in the wrong; and he must be able truthfully to assert that he put the whole responsibility upon the drawee and relied upon him to decide, and that the mistake arising from his negligence cannot now be corrected without placing the holder in a worse position than though payment had been refused. If the holder cannot say this, and, especially, if the failure to detect the forgery, and consequent loss, can be traced to his own disregard of duty, in negligently omitting to exercise some precaution which he had undertaken to perform, he fails to establish a superior equity to the

[1] Allen *v.* Fourth Nat'l Bank, 59 N. Y., 12.
[2] 4 Ohio St., 628.

money, and cannot, with a good conscience, retain it. To allow him to do so would be to permit him to take advantage of his own wrong, and to pervert a rule, designed for his protection against the negligence of the drawee, into one for doing injustice to him." And it was also observed in this case, "that where the negligence reaches beyond the holder, and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of the parties or the course of business devolved upon the holder, in relation to the genuineness of the paper, he cannot, in negligent disregard of this duty, retain the money received upon a forged instrument." And the same doctrine has been enunciated by other courts.[1]

In Ellis & Morton *v.* Ohio Life Ins. and Trust Company,[2] above referred to, a check drawn upon the plaintiffs was presented by a stranger to the defendants, who advanced the money upon it without requiring him to be identified. The same day the defendants sent it to the plaintiffs with other items of exchange, and it was included in the payment of the general balance. Ten days afterwards the check was discovered to be a forgery, and it was returned to the defendants and repayment demanded. Upon the trial the plaintiffs introduced evidence to show that it was a general custom in Cincinnati, when a check was presented by a stranger to a bank not the one upon which it was drawn, to make inquiries in reference to his right to the check, and the

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[1] First Nat'l Bank *v.* Ricker, 71 Ill., 439; Rouvaut *v.* San Antonio Nat'l Bank, 63 Tex., 610. See, also, Leather Manufacturers' Nat'l Bank *v.* Morgan, 117 U. S., 96; Hardy *v.* Chesapeake Bank, 51 Md., 562.

[2] 4 Ohio St., 628.

identity of the person. And with a view to showing that the conduct of the defendants had misled them, they submitted evidence to prove their uniform custom of making such inquiries, when a check of this character, drawn upon them, was presented by a stranger, and that there was not generally so strict a scrutiny when checks came from other banks, it being presumed that caution had already been exercised. The plaintiffs were non-suited in the court below, but the Supreme Court held that the evidence adduced by them should have been submitted to the jury, and accordingly the judgment of the lower court was reversed; and it was said that should the plaintiffs be able to satisfy a jury of the state of facts which this evidence conduced to prove, they would establish a clear right to recover; for such custom being shown to exist, the failure of the defendants to require the person for whom they cashed the check to be identified was such negligence as would throw the loss upon them.

Where the depositor does not sign his name, but makes his mark, the drawee bank has the right to assume that the bank from which the paper is received has had him properly identified, and if the order is forged may recover from such bank the amount paid upon the instrument.[1]

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[1] State Nat'l Bank *v.* Freedmen's Savings and Trust Co., 2 Dillon, 11.

The State National Bank of Keokuk issued a certificate of deposit to one Tim Dunivan, who, being unable to write, made his mark in the signature book of the bank, the officers of the bank entering his description opposite the mark. This certificate was afterwards stolen from Dunivan, and was presented at the counter of the Freedmen's Savings and Trust Company in St. Louis by a stranger, with the request that it be cashed. The

On the principle that the holder must do nothing to mislead the bank, it is held that if he takes the instrument under suspicious circumstances, and gives it credit by indorsing his name thereon, the bank may recover from him; for his receiving and indorsing the instrument would have a tendency to throw the officers off their guard, and cause them to accept and pay it, without

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cashier declined to advance the money upon it, but took it for collection. The cashier asked the stranger if his name was Tim Dunivan, and he replied in the affirmative. He was then asked if he could write his name, to which he replied that he could not. The cashier then wrote upon the instrument the following indorsement: "Pay to the order of W. N. Brant, cashier, Tim his x mark Dunivan," the person himself making the mark; and this was witnessed by W. P. Brooks, an employé of the bank. The certificate was then forwarded to a correspondent, to whom it was paid by the bank which issued it. Afterwards, upon the discovery of the forgery, the Keokuk Bank paid the amount to the real Tim Dunivan, and brought suit therefor against the Savings and Trust Company. Treat, District Judge, charged the jury that the case turned mainly on the question of negligence, and after explaining the general rule that a bank paying on the forged signature of a customer must lose the amount, said: "This is a different case. There was a person who could not write. The bank gave him the certificate and took his description. The ordinary mode when a person signs by his mark is to have him identified, so that a piece of paper coming back to the Keokuk Bank through respectable institutions, with the depositor's mark on the back of it witnessed by another party, the bank issuing the certificate would have the right to suppose that the bank sending the certificate had so identified the man making his mark. The witness's signature is proven. Mr. Brooks himself says he signed it. The simple fact, then, that the paper comes back to the Bank of Keokuk with a mark witnessed by Mr. Brooks, which means that he knew Mr. Dunivan to be the person who made that mark, is sufficient to justify the Keokuk Bank in paying the draft."

subjecting it to the same scrutiny as if it had been indorsed and presented by a stranger.[1]

Bank may Recover when Alteration is in the Body of the Instrument.—But the bank is not bound to know that the check is genuine in any respect other than the signature. The presumption that the officers of the bank know the signature of the drawee better than the holder can is reasonable and just. But, as was observed in the case of the Bank of Commerce *v.* Union Bank,[2] a rule which would require the bank to know the handwriting of the residue of the check would be not only arbitrary and rigorous, but unjust. As the check is frequently filled up in the handwriting of some person other than the drawee, there can be no presumption that the opportunities of the bank for knowing whether the body is genuine are any better, or even as good, as those of the holder, who knows the person from whom he received the check, and the circumstances under which it was issued. So far as regards the body of the check, the presumption is that each party to it takes it on the credit of the prior parties, and the greater negligence is chargeable to the holder for taking it.[3]

When, therefore, the bank has paid a check which has been altered in the amount, the name of the payee, or the date, it may recover from the person to whom it

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[1] Rouvaut *v.* San Antonio Nat'l Bank, 63 Tex., 310; First Nat'l Bank *v.* Ricker, 71 Ill., 439.

[2] 3 N. Y., 230.

[3] Bank of Commerce *v.* Union Bank, 3 N. Y., 230; Nat'l Park Bank *v.* Ninth Nat'l Bank, 46 N. Y., 77; Redington *v.* Woods, 45 Cal., 406. See also Marine Nat'l Bank *v.* City Nat'l Bank, 59 N. Y., 67; Espy *v.* Bank of Cincinnati, 18 Wall., 604.

made such payment, even though he is a *bona fide* holder for value.[1] But if the bank is chargeable with neglect which has operated to the injury of the other party, then, as against a *bona fide* holder, it must sustain the loss. What will constitute such neglect will depend upon the circumstances of the particular case. But it is well settled that the mere fact that the body of the check is in a handwriting different from that in which the checks of the depositor are usually filled up will not be such a suspicious circumstance as will charge the bank with being at fault.[2] In the case of Redington *v.* Woods, it was said by Crockett, J.: "The mere fact that the body of the check was in a different handwriting from that usually employed was not of itself sufficient to raise the slightest suspicion of fraud. The practice is so common in all commercial communities of causing checks of the same drawer to be filled up in different handwritings, that it is not to be presumed the attention of the drawee will be particularly called to the handwriting in the body of the paper. It is the signature which verifies the instrument, and not the writing in the body of it, and if the signature be genuine and the writing in the body of the paper in the usual form, though in a different handwriting from that usually employed, there will be nothing in the latter circumstance to excite the slightest suspicion of fraud."

Within What Time Bank Must Give Notice and Demand Restitution.—The bank has a reasonable time within which to detect the forgery and demand

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[1] See cases cited in note 3, page 62.

[2] Redington *v.* Woods, 45 Cal., 406.

restitution. What will be such a reasonable time will depend greatly on the circumstances of each particular case. If no negligence is attributable to the bank in failing to make the discovery, it will ordinarily be sufficient if notice is given to the holder as soon as the forgery is known.[1] In several cases recovery has been allowed where there was a delay of some weeks and even months.[2] The earlier English cases, which hold that there can be no recovery unless the payor gives notice on the very day of payment and before any change of circumstances, have not been followed in this country. In the case of the Canal Bank *v.* Bank of Albany it was said by Justice Cowen: "But I am not willing to concede that delay in the abstract, as seems to be supposed, can deprive the party of his remedy to recover back money paid under the circumstances before us. It is said that the defendants had indorsers behind them, and by delay they were prevented from charging them by giving reasonable notice. Admit this to be so. The plaintiffs did not stand in the relation of a holder. They were the drawees, and advanced the money by way of payment. They would never, therefore, think of notice to defendants till they accidentally discovered the forgery. If there had been any unreasonable delay after such discovery another question would be presented."

In that case the payment had been made by the Canal Bank on a forged indorsement on the 28th of March, and it was not until the 7th of the following

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[1] Canal Bank *v.* Bank of Albany, 1 Hill, 287; Third Nat'l Bank *v.* Allen, 39 Mo., 310.

[2] Canal Bank *v.* Bank of Albany, *supra;* Rouvaut *v.* San Antonio Nat'l Bank, 63 Tex., 610.

June that the Bank of Albany was notified of the forgery and called upon to refund the money. Still it was held that there could be a recovery.

CHAPTER XI.

CERTIFICATION OF CHECKS.

The Obligation Assumed By the Bank. — By certifying a check the bank obligates itself to retain the amount for which the check is drawn (and which by the certificate it admits it has on hand to the drawer's credit) to meet the check when presented, and to pay the amount to the holder on demand.[1] If written out, the certificate would contain a statement that the drawer has funds sufficient to meet it in the bank applicable to its payment, and an agreement on behalf of the bank that these funds shall be retained and paid upon the check whenever it is presented.[2] The theory of the law is that the bank at the time it gives the certificate actually has funds of the drawer to that amount applicable to the purpose; and any person taking such a certificate in good faith has the right to presume that such is the fact, and the bank cannot be heard to allege the contrary.[3]

Effect of Certification.—When it has certified a check the bank becomes at once primarily liable for its

[1] Merchants' Bank *v.* State Bank, 10 Wall., 648; Cooke *v.* State Nat'l Bank, 52 N. Y., 96; Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, 16 N. Y., 125.

[2] Per Church, C. J., in Cooke *v.* State Nat'l Bank, *supra.*

[3] See cases cited in note 1.

payment. In contemplation of law the amount thereof is immediately charged to the account of the drawer, and as to him the effect is the same as if the bank had paid the money upon the check. The bank, therefore, ceases to be indebted to the depositor as to the amount specified in the instrument, and such amount thenceforth passes to the credit of the holder, and is specifically appropriated to pay the check when presented. And even if the instrument should come back into the hands of the depositor, he could claim the amount, not by virtue of his original deposit, but solely by virtue of his right as holder.[1]

A case decided a few years since in the Supreme Court of Alabama affords an excellent illustration of the effect of certifying a check. P deposited with Miller & Co., his bankers, a check drawn upon another bank in his favor, which was placed to his account and entered on his pass-book. During the same day Miller & Co. sent the check to the drawee bank, and had it certified. Afterward, on the same day, they were served with process of garnishment in a suit by a creditor of P's, and still later in the day P notified them not to present the check for payment, and demanded its return. The question was whether the amount of the check, at the time of the service of garnishment, was a legal demand due by Miller & Co., the garnishees, to the depositor, which the latter could enforce in his own name in an action at law. The decision was put upon the sole ground of the effect of the certification, which

[1] First Nat'l Bank *v.* Leach, 52 N. Y., 350; Girard Bank *v.* Bank of Penn Township, 39 Penn. St., 92; Essex County Nat'l Bank *v.* Bank of Montreal, 7 Bissell, 197; Nat'l Commercial Bank *v.* Miller, 77 Ala., 168.

was held to have established at once the relation of debtor and creditor as to that amount between Miller & Co. and the depositor. The court said: "When the check was certified, it ceased to possess the character or perform the functions of a check, and represented so much money on deposit, payable to the holder on demand. The check became a basis of credit—an easy mode of passing money from hand to hand, and answering the purposes of money. The garnishees, by accepting a certification of the check, made it their own, and the relation of debtor and creditor was created between them and the defendant." [1]

What Officer May Certify.—It is well settled that the cashier has *virtute officii* the power to certify checks.[2] And in New York there are judicial dicta to the effect that this power also belongs to the office of the paying-teller.[3] In the important case of Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, it was said by Selden, J.: "The act of certifying a check is simply answering the supposed inquiry, of one about to take the check, whether the bank has funds of the drawer to meet it; and no other officer or agent of the bank would seem to be so competent to give the answer as the paying-teller. His duties impose upon him the duty of knowing the state of every depositor's account. He is charged with all he pays out, and, if he pays a check without funds in hand, he is responsible to the

[1] Nat'l Commercial Bank *v.* Miller, 77 Ala., 168.

[2] Merchants' Bank *v.* State Bank, 10 Wall., 666; Cooke *v.* State Nat'l Bank, 52 N. Y., 96.

[3] Farmers' and Merchants' Bank *v.* Butchers' and Drovers' Bank, 16 N. Y., 125, per Selden, J.; Irving Bank *v.* Wetherald, 36 N. Y., 335, per Hunt, J.

bank for the amount. His knowledge exceeds that of the book-keeper, because, to the information obtained from the latter, he adds a knowledge whether any deposits have been made or checks paid since the last entry in the books. No doubt the cashier, by virtue of his general powers and his presumed knowledge of all the affairs of the bank, would be competent to answer the question; but he could only do so by first inquiring of the book-keeper and teller. Why should the applicant be compelled to seek the information through this circuitous channel, instead of going directly to the ultimate source of knowledge on the subject? The teller is put in the place of the cashier, to perform a portion of his duties. His appointment is virtually a division of the office of cashier; and that branch of the office which the teller fills embraces those duties which particularly require a knowledge of the state of the accounts of the depositors. Why, then, should he not be the organ of communication on that subject?"

But it has been expressly held in Massachusetts that this power is not inherent in the office of the paying-teller; and, moreover, that such a power cannot be shown to exist by evidence of a general usage among banks for paying-tellers to certify checks, such a usage being considered bad, for the reason that it is in effect a power to pledge the credit of the bank.[1] It should be

[1] Mussey *v.* Eagle Bank, 9 Metc., 313.

In a late case in Pennsylvania an effort was made to show a general usage for assistant tellers to certify checks, but the evidence failed to establish any such usage. And Paxson, J., said: "It is, moreover, a grave question whether such a usage is not essentially bad, for the reason that it is in effect a power to pledge the credit of the bank to its customers." Hill *v.* Union Trust Company, 108 Penn. St., 1. But as the point was not involved in the decision of the case, this observation is merely a dictum.

stated, however, that this case was decided more than forty years ago, before certified checks had come into such general use, and that the line of reasoning adopted in the opinion of Wilde, J., has not been followed in any subsequent case.[1]

But whether the power is inherent in the office or not, the bank will be bound by the certificate of the paying-teller, either where the authority has been expressly conferred upon him by the directors or where it has been his custom to certify checks with the knowledge and acquiescence of the directors or managing officers.[2]

It has been decided in New York that the power to certify checks is not inherent in the office of assistant cashier, and that any person taking a check certified by such an officer takes it at the risk of showing that he had the requisite authority, or that the bank, by reason of the action of its directors or managing officers, in permitting him to give certificates of this kind is estopped from denying his authority.[3]

Officer Cannot Certify His Own Check.—It is a general rule of law that the powers conferred upon an agent are to be used for the exclusive benefit of the principal, and that the agent cannot bind his principal in any matter in which he is an interested party on the opposite side ; and upon these grounds it is held that a bank officer authorized to certify checks cannot bind

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[1] Merchants' Bank *v.* State Bank, 10 Wall., 666 ; Cooke *v.* State Nat'l Bank, 52 N. Y., 96 ; Hill *v.* Union Trust Company, 108 Penn. St., 1.

[2] Farmers' and Merchants' Bank *v.* Butchers' and Drovers' Bank, 16 N. Y., 125.

[3] Pope *v.* Bank of Albion, 57 N. Y., 126.

the bank by the certification of his own check.[1] And no person taking the check of an officer certified by that officer himself can acquire the rights of a *bona fide* holder; for the instrument itself bears evidence, and conveys notice, that the certification was improper.[2]

Certification Without Funds.—No officer of the bank has any implied authority to certify a check, unless the depositor has funds on deposit to the amount named therein. But if an officer authorized to certify does give such a certificate in violation of his duty, the bank will be liable thereon to a *bona fide* holder. The liability of the bank in such case is not based upon any power of its certifying officer to bind it by such a contract without funds, but upon the ground that the bank is estopped from disputing his representation that there are funds.[3]

When Bank May Recall Certificate Made by Mistake.—When a bank has certified an instrument by mistake, it may recall such certificate if the error has not been the cause of loss or injury to the other party.[4] Where the certificate of the paying-teller that a note payable at the bank was good was discovered later in the day to have been a mistake, and the note was returned to the presenting bank in sufficient time to have enabled it to make another presentment and give notice to the indorsers, it was held that the error could be cor-

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[1] Claflin *v.* Farmers' and Citizens' Bank, 25 N. Y., 293.

[2] *Id.*

[3] Merchants' Bank *v.* State Bank, 10 Wall., 604; Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, 16 N. Y., 125; Cooke *v.* Nat'l State Bank, 52 N. Y., 96.

[4] Second Nat'l Bank *v.* Western Nat'l Bank, 51 Md., 128. See also Irving Bank *v.* Wetherald, 36 N. Y., 335.

rected.[1] "There can be no such rule of law as would make a memorandum of this description irrevocable the moment it is placed upon the note. If put there in error, like any other error or mistake it may be corrected before rights and liabilities have been incurred or losses sustained in consequence of it."[2]

May Recover Money Paid on Check Raised After Certification.—And where a bank has paid a check raised after certification, it may recover the amount, unless in the mean time the position of the other party has been changed so that it would be unjust to require him to refund.[3]

Certified Check not Outlawed by Delay in Presenting.—The holder of a certified check is regarded by the courts as standing on the footing of an ordinary depositor, and, therefore, the instrument is not outlawed by delay to make demand of payment.[4] In a leading case on this point it was said: "Such a deposit stands expressly upon the same ground as any other. The bank, instead of being prejudiced, is benefited by the delay of the owner in calling for its payment, and

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[1] Second Nat'l Bank *v.* Western Nat'l Bank, 51 Md., 128.

[2] *Id.*, per Brent, J. In this case an offer was made to show a usage that a certification made in error could not be revoked at all. But the evidence was rejected upon the ground that any such usage would be unreasonable and repugnant to the well-settled rule of law.

[3] Nat'l Bank of Commerce *v.* Nat'l Mechanics' Banking Association, 55 N. Y., 211.

[4] Girard Bank *v.* Bank of Penn Township, 39 Penn. St., 92; Willets *v.* The Phœnix Bank, 2 Duer, 121; Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, 4 *Id.*, 219; 16 N. Y., 125.

can with no more propriety impute laches to the unknown holder of the check than to the known holder of an ordinary deposit."[1] In Girard Bank *v.* Bank of Penn Township, the leading case on this point, the check was outstanding for nearly seven years; but it was held that this delay did not bar a recovery. The statute of limitations does not begin to run from the date of the check or the date of its certification, but from the time that payment is demanded and refused.[2]

Verbal Acceptances.—It is a rule of commercial law that if one promises to accept a bill, and another person takes such bill upon the faith of that promise, this will operate as a virtual acceptance; and this rule applies where a bank promises to pay checks drawn upon it.[3] But in order that the person taking such check may hold the bank for the amount, he must show that the promise of the bank was communicated to him; for otherwise it would be quite clear that he had not acted upon the faith of the promise, and there would be no privity between him and the bank.[4] Whether in any particular case such a promise amounts to a technical acceptance is not a matter of much practical importance, for, if a recovery cannot be had upon the check as an accepted check, it may be had in an action founded upon a breach of the promise to accept.[5]

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[1] Willets *v.* The Phœnix Bank, 2 Duer, 121, per Oakley, C. J.

[2] Girard Bank *v.* Bank of Penn Township, 39 Penn. St., 92.

[3] Nelson *v.* First Nat'l Bank, 48 Ill., 36.

[4] Nelson *v.* First Nat'l Bank, *supra;* First Nat'l Bank *v.* Pettel, 41 Ill., 492; Carr *v.* Nat'l Security Bank, 107 Mass., 48.

[5] Nelson *v.* First Nat'l Bank, *supra;* Boyce *v.* Edwards, 4 Peters, 122.

Not Essential that Check Should be in Existence.—It is not essential that the check should be in existence at the time the promise is made; a promise to pay a non-existing check will be equally binding upon the bank, if such check is described with sufficient certainty, so that there may be no mistake as to the instrument to which the promise is to apply.[1] Nor is it required that the check should be described by giving the name of the payee, the amount, etc., but it will be enough to specify generally checks drawn for a special purpose or in a particular transaction, when there can be no doubt what checks were intended.[2] Thus, where a bank agreed to pay checks of A to the value of a certain cargo of corn (without specifying any particular check), it was held that a check given by A in the purchase of the corn was covered by the agreement.[3]

Promise may be Merely Verbal.—At common law an acceptance of a check need not be in writing, but may be merely verbal. But in England, and in many of the States of the United States, there are statutes to the effect that no person shall be charged as an acceptor of a bill of exchange unless his acceptance shall be in writing;[4] and a check is a bill of exchange within the meaning of such statutes.[5] In those States

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[1] Nelson *v.* First Nat'l Bank, 48 Ill., 36.

[2] *Id.*

[3] *Id.*

[4] Statutes of this kind have been adopted in Alabama, Arkansas, Arizona, California, Dakota, Georgia, Idaho, Kansas, Maine, Michigan, Minnesota, Mississippi, Nevada, New York, Oregon, Pennsylvania, Washington, and Wisconsin.

[5] Duncan *v.* Berlin, 60 N. Y., 151; Risley *v.* Phœnix Bank, 83 N. Y., 318.

in which the common-law rule prevails, the bank may be bound by a mere verbal promise to pay.[1] But if the drawer has no funds on deposit, and this fact is known to the person with whom the engagement is made, then a mere verbal promise would be ineffectual to bind the bank; for in such case the promise is to pay the debt of another, and is within the statute of frauds.[2]

Certification of Forged and Altered Instruments. By analogy to the rules which govern the acceptance of bills and the payment of checks, it has been held that a bank, in certifying a check, asserts that the signature of the drawer is genuine, but not that the instrument is genuine in any other respect.[3] If the signature is forged, the bank will not be permitted to question the genuineness of the instrument, for this would be contradicting its own assertion that the signature is genuine. But where the forgery is in the body of the instrument, as where the amount has been raised or the name of the payee changed, then, as the bank has not asserted that the instrument is genuine in these respects, it will not be estopped from showing the fact of the alteration.[4] The question whether a bank certifying a check, which has been raised before the certification, would be liable to the holder for the full amount came before the New York Court of Appeals in 1874, and, because of its great importance to the commercial community, received very full and elaborate consideration. After a judgment had

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[1] Nelson *v.* First Nat'l Bank, 48 Ill., 36.

[2] Morse *v.* Mass. Nat'l Bank, 1 Holmes, 209.

[3] Marine Nat'l Bank *v.* Nat'l City Bank, 59 N. Y., 67; Security Bank *v.* Nat'l Bank of the Republic, 67 N. Y., 458.

[4] See cases cited in preceding note.

been reached by a full court that the bank would not be so liable, a motion was made for a reargument, founded upon the affidavits of a number of business men of New York City, as to the meaning which the certification of a check was understood to have by the business community. But it was found that these affidavits did not show "any custom or usage, either general or particular, by which any meaning or interpretation has been given to the words used in the certifying of checks by the bank on which they are drawn, or effect to the act of certification, other than that which the language used in the ordinary and popular sense would imply." And the court further observed that there was no pretense that the enlarged liability sought to be fixed upon a bank certifying a check had ever been recognized or acted upon, and that no such practical interpretation had ever been put upon a certification.

On account of the importance of this decision to business men and bankers we may be permitted to quote somewhat at length from the opinion of the court, so as to show the reasons (which are set forth with admirable clearness and perspicuity) that led the court to its conclusion. Among other things it was said: "As a promissory obligation, courts have given the certification of a check the same effect as the acceptance of a bill of exchange by the drawee. They have also, adapting the well-settled rules of law to this particular and very convenient mode of transacting business, regarded the act of certifying a check as, for some purposes, the equivalent of a payment to the person presenting it and claiming to be the holder, and have held that, when a payment actually made could be recovered back as made by mistake, there was no liability by

reason of the certificate that could be enforced by law. To hold that the act of certifying a check is an act of graver import, involving greater responsibilities than the acceptance of a bill of exchange or the actual payment of the same check, would be a violation of all the analogies of the law, and unreasonable. Whether it should be the duty of the person taking a check, and who knows or may know the individual with whom he deals, and may easily trace the title and ascertain the genuineness of the check in all its parts, or the bank to whom it is presented in the hurry of business, and, perhaps, by a stranger wholly unknown or an irresponsible messenger, for certification upon the instant and without opportunity for inquiry, to ascertain all the extrinsic facts which are now claimed to be implied and warranted by the act of certification may not be for us to determine. But to us it seemed more reasonable that that duty should rest upon the one receiving the check. It is believed that banks do not always demand identification or proof of title in the person presenting the check for certification; and if they merely certify to the genuineness of the signature of the drawer and the sufficiency of the fund, the other matters can safely be left until payment is demanded. But upon the theory of the defendant's counsel a bank must ascertain to a certainty, before certifying, that the check has not been altered or tampered with, and that the indorsements are genuine—that is, that the check is genuine in all its parts, and that the apparent holder has a valid title. It is evident that to cast all this responsibility upon the certifying bank would put a stop to the certifying of checks, except when presented by the drawer or under very peculiar circumstances."

After having shown that the only facts which the bank could be presumed to know were the signature of the drawer and the state of his account, the court proceeded: "It is only assertions of facts within the knowledge or which may reasonably be presumed to be within the knowledge of the party making them that imposes an obligation, and for the truth of which the law holds him legally responsible. An inquiry may reasonably and properly be made of the drawee of the check as to the genuineness of the signature of the drawer and the state of his account, but a resort would be had to other sources of information to learn the consideration of the check, by whom the body was written, the genuineness of the indorsement, and the title of the payee. As to such matters the drawee could not be supposed, ordinarily, to have any information and would not be called upon or expected to give answer in respect to them; hence, in all reason, as well as legally, the inquiring of a drawee in respect to a check and the response, whether verbally or in writing, that it is 'good' must be held, in the absence of circumstances indicating a wider reach of inquiry and a broader answer, to relate to those facts, and those only, of which the drawee is presumed to have knowledge, viz., the two facts before mentioned."

But these views of the New York court have not been universally accepted. In a case which arose in New Orleans between the Louisiana National Bank and the Citizens' Bank it was held by the Supreme Court of Louisiana that the certification estops the bank from questioning the amount as against a *bona fide* holder who takes the check upon the faith of the certification.[1]

[1] Louisiana Nat'l Bank *v.* Citizens' Bank, 28 La. Ann., 189.

This case was decided in 1876, which was subsequent to the decision in Marine National Bank *v.* National City Bank.[1] The doctrine of the latter case was not dissented from, but a distinction was taken between the two cases from the circumstance that in the New York case the party who had the check certified was the same whose name was in the check as payee, whereas in the case between the New Orleans banks the holder was not a party to the check. The New York court has not, however, put its decisions upon any distinction between the rights of one whose name has been wrongfully inserted in the check and one who has taken it by transfer from the payee, but all of its decisions on the point have been put upon the broad ground that the bank cannot be presumed to warrant the genuineness of the body of the instrument.[2] And, indeed, it is not seen how any substantial distinction could be taken between the two cases, if in neither case there has been any negligence or bad faith.

Showing Meaning of Contract by Custom and Usage.—The case of Marine National Bank *v.* National City Bank having settled for the State of New York the extent and meaning of the obligation which the certifying bank incurs, evidence is no longer admissible in that State to show that by the usage or custom of merchants and bankers the contract of certification has a larger scope and meaning than that which the courts

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[1] 59 N. Y., 67.

[2] Marine Nat'l Bank *v.* Nat'l City Bank, 59 N. Y., 67; Security Bank *v.* Nat'l Bank of the Republic, 67 N. Y., 458; Clews *v.* Bank of New York Nat'l Banking Association, 89 N. Y., 418.

have given to it;[1] but in other States, where the question is an open one, evidence of the common understanding as to the obligation which the bank assumes would be properly admitted, and, if it could be shown that in any community there is an established usage or custom to import to the bank an obligation to pay the amount stated in the instrument, notwithstanding the body of the check was forged, the courts would be bound, by well-established legal principles, to adopt this as the rule of law.

Assurance of Officer that Instrument is Genuine in All Particulars does not Bind Bank.—As the bank is presumed to have the means of knowing but the two facts, viz., that the signature of the drawer is genuine and that he has funds on deposit sufficient to meet the check, it will not be bound by the representation of its certifying officer that the instrument is genuine in other particulars.[2] D. & T., gold brokers, were tendered a check by a stranger in payment for gold, but before accepting it as payment one of the firm took it to the bank on which it was drawn and told the teller that he did not like the looks of the messenger who brought the check to them, and who was a total stranger, and that he wished the teller to be very particular before certifying the check; that he had doubts about it, and he wanted to be assured that the check was genuine in every particular. The teller examined it, certified it, and when he handed it back said, "You need not have the slightest doubt about that

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[1] Security Bank *v.* Nat'l Bank of the Republic, 67 N. Y., 458.

[2] Security Bank *v.* Nat'l Bank of the Republic, *supra;* Clews *v.* Bank of New York Nat'l Banking Association, 89 N. Y., 418.

check; it is correct in every particular; the drawer is a director of this bank." It afterward turned out that the check had been altered in the date, the name of the payee, and the amount, which had been raised from $24.16 to $4,222.75. The bank upon which the check was drawn, having paid it, brought an action to recover as for money paid by a mistake.

The court held that there could be a recovery, and that the representation of the teller did not work an estoppel. Andrews, J., writing the opinion, said: "There is no ground for claiming that the plaintiff was estopped from showing the body of the check to be a forgery by the verbal assurance of the teller to the payee of the check that it was correct in every particular. It was no part of the teller's duty to give an assurance as to the genuineness of the check, except in respect to the signature of the drawers. If he went beyond this, his representation did not bind the bank. Moreover, if the reply made to the question put to him was intended as an affirmation of the genuineness of the body of the check, it was simply an expression of his opinion, and must have been so understood by the person who made the inquiry."[1]

CHAPTER XII.

THE BANK-BOOK OR PASS-BOOK.

It is customary with every bank to furnish each of its depositors with a small pass-book, called also a bank-

[1] Security Bank *v.* Nat'l Bank of the Republic, 67 N. Y., 458.

book, in which is entered, on the debtor side, the date and amount of each deposit, generally at the time the deposit is made; and at regular or irregular intervals this pass-book is sent into the bank, and all payments made for the depositor are entered upon the other side of the account, and the balance is struck; after which the book is returned to the depositor, together with his checks and other vouchers. The writing up of the bank-book and returning it to the depositor is the statement of an account by the bank; and by retaining it, after a reasonable time for the examination of it has elapsed, without objection, the customer is deemed to acquiesce in it, and to admit it to be correct, and is equally bound by it as an account stated.[1] But this account is only *prima facie*, and not conclusive, evidence of the dealings between the parties.[2] Like any other account it may be impeached for fraud or mistake. If the depositor is credited with a greater amount than he has in fact deposited, the bank is not precluded from showing that fact by any competent evidence.[3] And, on the other hand, the depositor, after he has accepted the account as correct, may show that there has been an error, unless his acquiescence has led the bank into a belief of a certain state of facts to its prejudice.[4] Touching this subject, Justice Hunt, in delivering the opinion of the

[1] Weisser *v.* Denison, 10 N. Y., 68; Hardy *v.* Chesapeake Nat'l Bank, 51 Md., 562.

[2] First Nat'l Bank *v.* Whitman, 94 U. S., 343; Weisser *v.* Denison, *supra;* Welsh *v.* German American Bank, 73 N. Y., 424, Frank *v.* Chemical Nat'l Bank, 84 N. Y., 209; Hardy *v.* Chesapeake Nat'l Bank, *supra;* Manufacturers' Nat'l Bank *v.* Barnes, 65 Ill., 69; Nat'l Bank *v.* Tappan, 6 Kans., 456.

[3] Commercial Bank *v.* Rhind, 3 Macq. H. L. Cas., 643.

[4] See cases cited in note 2.

Supreme Court of the United States in the case of First National Bank *v.* Whitman, said: "Mistakes in bank accounts are not uncommon. They occur both by unauthorized or pretended payments, as well as by the omission to give credit for money deposited. When discovered, the mistake must be rectified, and an ordinary writing-up of a bank-book, with a return of vouchers or a statement of accounts, precludes no one from ascertaining the truth and claiming its benefit."

Duty of Depositor to Examine Bank-Book.—As to the duty of the depositor in respect to examining his pass-book and reporting any mistake to the bank, it is such as that which prudent men usually bestow on the examination of such accounts; but, in ordinary cases, not more than this.[1] On this point the Supreme Court of the United States has said in a recent case:[2] "It is within common knowledge that the object of a pass-book is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank. It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. The sending of his pass-book to be written up and returned with the vouchers is, therefore, in effect a demand to know what the bank claims to be the state of his account. And the return of the book, with the vouchers, is the answer to that

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[1] Leather Manufacturers' Bank *v.* Morgan, 117 U. S., 96; Frank *v.* Chemical Nat'l Bank, 84 N. Y., 209; Hardy *v.* Chesapeake Nat'l Bank, 51 Md., 562.

[2] Leather Manufacturers' Bank *v.* Morgan, *supra.*

demand, and, in effect, imports a request by the bank that the depositor will, in proper time, examine the account so rendered and either sanction or repudiate it. In Devaynes *v.* Noble, 1 Meriv., 530, 535, it appears that the course of dealing between bank and customer, in London, was the subject of inquiry in the High Court of Chancery as early as 1815. The report of the master stated, among other things, "that for the purpose of having the pass-book 'made up by the bankers from their own books of account, the customer returns it to them from time to time as he thinks fit; and, the proper entries being made by them up to the day on which it is left for that purpose, they deliver it again to the customer, who thereupon examines it, and, if there appears any error or omission, brings or sends it back to be rectified; or, if not, his silence is regarded as an admission that the entries are correct.' This report is quite as applicable to the existing usages of this country as it was to the usages of business in London at the time it was made. The depositor cannot, therefore, without injustice to the bank, omit all examination of his account, when thus rendered at his request. His failure to make it, or to have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a pass-book. * * * In their relation with depositors, banks are held, as they ought to be, to a rigid responsibility; but the principles governing those relations ought not to be extended so as to invite or encourage such negligence by depositors in the examination of their bank accounts as is inconsistent with the relation of the parties or with those established rules and usages, outlined by business men of ordinary pru-

dence and sagacity, which are, or ought to be, known to depositors."

Depositor may be Estopped to Question Account.—Such being the duty of the depositor, if his neglect to make an examination within a reasonable time leads the bank to believe that the account is acquiesced in and approved, and for that reason to omit to take steps for its protection which it could and would have taken had it been given notice that the account was incorrect, this will estop the customer from afterward questioning the correctness of the account. Thus, if the bank has paid altered or forged checks, and charged them to the customer upon his pass-book, the fact that the customer has neglected to make an examination of the account and vouchers, and notify the bank of the forgeries or alterations, may preclude him from afterward disputing these debits.[1]

But if the bank has not taken any action, or lost any rights in consequence of the depositor's silence, the only effect would be that the burden of proof is shifted onto him, and, instead of the bank being obliged to show that the account is correct, he is bound to show the mistake. Nor would anything more than this be the effect when it is clear that an examination of the pass-book and vouchers would not have disclosed the error or the fraud.[2]

Examinations by Clerk or Agent.—The examination may be made by an agent or clerk of the depositor; and if such agent or clerk makes the examination in

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[1] Leather Manufacturers' Bank *v.* Morgan, 127 U. S., 96.

[2] Frank *v.* Chemical Nat'l Bank, 84 N. Y., 209.

good faith, and with ordinary diligence, and gives due notice of any error found in the account, the duty of the depositor to the bank is discharged.[1]

But where the person employed in this matter is guilty of defrauding the bank, then, it would seem, the depositor is in no better position than if no examination had been made at all—unless he can show that he exercised reasonable diligence in supervising the conduct of such person in respect to this duty.[2]

CHAPTER XIII.

THE CLEARING-HOUSE.

In the larger cities the daily balances between the banks in the place are settled through the clearing-house. This institution is merely an association of all, or the more important, banks of the city for the purpose of settling their balances at one place and time, and thus avoiding the labor and delay of a separate settlement by each bank with every other. In brief, the practice is for each bank at a certain hour of each bank-day to send to the clearing-house the demands it has received against all the other banks since the last clearing, making them up in a separate bundle for each bank, with a ticket containing the items and aggregate of each bundle. Each bank receives a credit for the demands it has sent in against the other banks, and is charged with the demands which the other banks have sent in against it, and the balance is then struck and

[1] Leather Manufacturers' Bank *v.* Morgan, 127 U. S., 96.
[2] *Id*

settlement made accordingly. Mistakes made because any demands are not good are not usually adjusted through the clearing-house, but directly between the banks which are parties to them. [1]

Third Parties not Affected by Rules of the Clearing-House.—The rules and usages of the clearing-house, if not in conflict with law, are, of course, binding upon the banks which are members thereof, in the same way that a general usage in trade binds those who deal with reference to it. But these rules and usages are designed to operate strictly among the members for their own convenience in the dispatch of business, and the customers of a bank are not in a situation to claim the benefit of them, nor, on the other hand, to be injuriously affected by them.[2] And the fact that a bank which is a member of the clearing-house is acting as the agent of its customer will not bring the case within the operation of the rule that the principal is entitled to the benefit of the contract of the agent while transacting the business of the principal; for the rules of the clearing-house are a mere labor-saving arrangement, designed for the exclusive benefit of the agent.[3] Therefore, the indorsers of a promissory note

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[1] For a statement of the course of business in the various clearing-house associations see the following cases: Merchants' Nat'l Bank *v.* Nat'l Eagle Bank, 101 Mass., 281; Overman *v.* Hoboken City Bank, 30 N. J. Law, 61; Stuyvesant Bank *v.* Nat'l Mechanics' Banking Association, 7 Lansing, 197; Bloffer *v.* Louisiana Nat'l Bank, 35 La. Ann., 251; Preston *v.* Canadian Bank, 23 Fed. Rep., 179; Dutton *v.* Merchants' Nat'l Bank, 16 Phil., 94.

[2] Overman *v.* Hoboken City Bank, *supra;* Stuyvesant Bank *v.* Nat'l Mechanics' Banking Association, *supra.*

[3] *Id.*

sent through the clearing-house to the bank at which it is payable cannot set up any rule of the clearing-house, by way of forfeiture or estoppel, to defeat the right of the bank which has discounted the note to recover against them.[1] So, the rule of the clearing-house, that checks not good are to be returned before a certain hour, cannot be set up by the payee of a check, who is not a member of the association, in order to charge the bank upon which the check is drawn with liability for the amount.[2] And where a bank which does not belong to the association employs a bank which is a member to clear for it, the former bank can have no cause of action against another member based upon a failure of such member to conform to the rules of the association.[3]

Effect of Clearing-House Rule that Checks not Good are to be Returned by a Certain Hour.—All clearing-houses have a rule that checks not good are to be returned by the banks receiving the same to the banks from which they were received by or before a certain hour of the same or the following day. The interpretation of this rule is a matter of great practical importance to the banks which are members of a clearing-house. Can a bank be required to receive back a check returned to it after the hour fixed? Or, if the bank upon which the check is drawn should fail to make the return within the time allowed by the rule, would it lose entirely its right to do so? The question

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[1] Manufacturers' Nat'l Bank *v.* Thompson, 129 Mass., 438.

[2] Overman *v.* Hoboken City Bank, 30 N. J. Law, 61.

[3] Stuyvesant Bank *v.* Nat'l Mechanics' Banking Association, 7 Lansing, 197.

has been before the Supreme Court of Massachusetts in several cases. The rule of the Boston clearing-house is that "whenever checks are sent through the clearing-house which are not good, they shall be returned by the banks receiving the same to the banks from which they were received as soon as it shall be found that said checks are not good; and in no case shall they be retained after one o'clock." The Massachusetts court has uniformly held that this rule does not so operate that a failure to return the check before the time named will work an absolute forfeiture of the right to make the return, and will be a perfect bar to any action to recover the amount of such check, but that it merely fixes a time at which the creditor bank may be authorized to treat the check as paid, and be able to regulate with safety its relation to other parties. The payment "must be regarded as only provisional until the hour of one o'clock, to become complete only in case the check is not returned at that time. And if by any mistake of fact the return of the check is not so made, then, as between the two banks, it is to be treated as a payment under a mistake of fact precisely to the same extent and with the same right to reclaim which would have existed if the payment had been made by the simple act of passing the money across the counter directly to the payee on the presentation of the check." And, therefore, under this interpretation of the rule, if the fact that the check is bad is not discovered until after one o'clock, nevertheless the bank upon which it is drawn, if such bank has exercised reasonable care, may return it to the bank which sent it through the clearing-house, if in the interval between one o'clock and the time of such return the latter bank has not changed

its position, as by paying the check or rendering itself liable for the amount.[1] But, in such case, there must have been reasonable care exercised by the bank upon which the check was drawn; there must have been such a mistake as will entitle a party to recover as for a mistake of fact. If there has been carelessness, there can be no recovery of the amount. Thus, where the account of the drawer of the check had not varied materially for a month, and had not been sufficient to meet the check for more than three months, and the teller paid the check without having made any examination of the account, it was held that the check could not be returned, there having been no mistake of facts in a legal sense, but laches merely.[2]

The correctness of the principle established in Massachusetts, that where there has been a mistake a check may be returned after the hour fixed by the rule of the clearing-house, was questioned in Preston *v.* Canadian Bank of Commerce,[3] a case which arose under the rules of the Chicago clearing-house. In that case Blodgett, United States district judge, said: "It seems to me that the Boston case has gone to the very verge of the

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[1] Merchants' Nat'l Bank *v.* Nat'l Eagle Bank, 101 Mass., 281; Merchants' Nat'l Bank *v.* Nat'l Bank of the Commonwealth, 139 Mass., 513.

[2] Boylston Nat'l Bank *v.* Thompson, 101 Mass., 287. But it is the rule in some jurisdictions that money paid under a mistake of facts may be recovered back, however negligent the party paying may have been, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund. (Nat'l Bank of Commerce *v.* Nat'l Mechanics' Banking Association, 55 N. Y., 211.) And where such rule prevails the doctrine stated in the text would not apply.

[3] 23 Fed. Rep., 179.

application of the rule that money voluntarily paid under a mistake can be recovered back. * * * If parties competent to contract within what time they may correct mistakes in their dealings with each other have so contracted, it seems to me the courts have no right to override or disregard such an agreement. If a mistake is discovered within an hour, or within ten minutes, after the expiration of the time limited by the agreement for its correctness may be corrected, I can see no reason why it cannot be corrected a week afterward, or whenever it is discovered. The Massachusetts court puts its decision on the ground that you may correct a mistake of this kind at any time after it is discovered, if it places the party to whom the check is returned in no worse condition than it would have been if it had been returned within the stipulated time, thus overlooking the rule that parties may agree that they shall not have the right to correct mistakes unless done within a limited time."

But this criticism was answered very conclusively by the Massachusetts court in a recent case.[1] "We have not," said Devens, J., "overlooked the right of parties to make such agreement as they choose. *The question is as to the interpretation of the rule which they, as members of the clearing-house, have adopted.* * * * If it were intended that mistakes should never be corrected unless discovered by one o'clock, this should in terms explicitly appear."

The weight of reason, as well as the weight of authority, would appear to be in favor of the interpretation which the rule has received in Massachusetts.

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[1] Merchants' Nat'l Bank *v.* Nat'l Bank of the Commonwealth, 139 Mass., 513.

In a recent case in the Supreme Court of Louisiana it was held that if a member of the clearing-house, knowing of its inability to meet the demands against it, should fail to give notice of such fact, as required by the rules, and should delay so to do until after a creditor bank, in the exercise of its right under the rules, has given its customers credit for the amount of the checks on the debtor bank sent by it through the clearing-house, settlement between the banks must be regarded as final and conclusive.[1]

Whether Sending Instrument Through the Clearing-House is a Demand of Payment.—Sending a check through the clearing-house is, of course, a demand for payment of the bank on which it is drawn.[2] But a different rule appears to prevail as to promissory notes made payable at a bank. In Massachusetts (which is the only State in which the question appears to have been determined judicially) it has been held that the sending of such a note through the clearing-house, not accompanied by any special demand of payment, can give no greater rights to the bank that sends it than if the note had been left at the bank where payable, without any demand of payment or any instructions in relation thereto; and, as a consequence, the maker would have until the close of banking hours to pay the note, and the bank receiving it could be in no default, if it was returned as soon as the fact became certain that it would not be paid.[3] But in this case it

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[1] Bloffer *v.* Louisiana Nat'l Bank, 35 La. Ann., 251.

[2] Reynolds *v.* Chettle, 2 Camp., 596.

[3] Nat'l Exchange Bank *v.* Nat'l Bank of North America, 132 Mass., 147.

appeared that it is not a uniform practice with the banks composing the Boston Clearing-House Association to send notes through the clearing-house; that some of the members decline to thus send or receive notes; and that those which do, take back the notes, if not paid, after one o'clock, the hour by which all checks not good are to be returned; from which facts the court drew the conclusion that sending notes through the clearing-house is simply a method, adopted by such banks as see fit to do so, for placing them in the banks where they are payable, to be collected in the usual and ordinary course of business.

The custom of banks composing other clearing-house associations is probably the same as that of the Boston banks, and the same rule would therefore apply to them. But if it is the uniform practice of all the banks belonging to any clearing-house association to send all notes through the clearing-house, then it would be held, no doubt, that sending a note through the clearing-house to the bank at which it is payable is a demand of payment.

Bank Which has Not Conformed to Customs and Usages of the Clearing-House Can Not Avail Itself of Them.—A bank which is a member of a clearing-house cannot avail itself of the advantages to be derived from the customs and usages of that institution when on its own part it has failed to conform to those customs and usages. For example, the custom of the banks composing a clearing-house association to return a check as not good when there is not enough money on deposit to pay it in full cannot control in determining what amount is to be refunded by the bank

from which it was received, when the bank upon which it was drawn has failed to comply with the rule that checks not good shall be returned before a certain hour.[1] And so, a bank which has not complied with the rule as to the notification to be given when a bank is not able to pay the balance against it forfeits or waives its right to any benefit accruing from the rule that when a bank cannot meet its obligations it is to hold in trust all the checks received by it that morning from the other banks.[2]

No Sanctity Attached to Communications Through Clearing-House.—The law attaches no sanctity to the clearing-house as a source of communication between banks, and none in fact can be imputed to it. Therefore, the fact that a forged check was received through the clearing-house will not afford the bank upon which it is drawn any better excuse for failing to detect the forgery than if the check had been presented at the bank counter.[3]

CHAPTER XIV.

COLLECTIONS.

Degree of Care and Skill Required.—As an agent for collection a bank is bound to the use of reasonable

[1] Merchants' Nat'l Bank *v.* Nat'l Bank of the Commonwealth, 139 Mass., 513.

[2] Bloffer *v.* Louisiana Nat'l Bank, 35 La. Ann., 251.

[3] Commercial and Farmers' Nat'l Bank *v.* First Nat'l Bank, 30 Md., 11.

skill and ordinary diligence. By reasonable skill is understood such as is ordinarily possessed and exercised by persons of common capacity engaged in the same business; and by ordinary diligence is understood that degree of diligence which persons of common prudence are accustomed to use about their own affairs. Anything short of this will be negligence; and for any loss resulting to the customer by reason of such negligence the bank will be liable.[1] But while the general rule is thus very simple in the abstract and very easily stated, the application of it is sometimes a matter of great difficulty.

Bank Regarded as Agent for Pay.—In the first place, it is to be observed that a collecting bank is regarded as an agent for pay, whether it does or does not make any special charge for the collection.[2] The expectation that more or less of the money may remain in its possession for a longer or shorter time forms a valuable consideration for the undertaking.[3] And although the making of collections may be an unproductive part of the bank's business, yet the whole ordinary business of the bank with its dealers (which is one of mutual profit or accommodation) is to be taken together, and the general profits and advantages of the business are deemed to constitute a consideration for any services of this kind.[4]

Duties as to Presentment.—The bank must pre-

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[1] Mechanics' Bank *v.* Merchants' Bank, 6 Metc., 13.

[2] Smedes *v.* Utica Bank, 20 Johns., 372.

[3] *Id.*

[4] Allen *v.* Merchants' Bank, 22 Wend., 215. See also Reves *v.* State Bank, 8 Ohio St., 465.

sent the paper for acceptance or payment, as the case requires, so as to charge all the parties thereto prior to the holder. Therefore, if presentment is made either too early or too late, so that any of the parties to the instrument are discharged from liability thereon, the bank will be held for the loss resulting to the customer.[1]

The bank must not receive any but a clear and unequivocal acceptance. If the acceptance is not in proper form, the customer must be immediately notified. Where a bill of exchange was drawn by a manufacturing company upon one of its officers individually, and he accepted in such form that the acceptance was that of the company and not his individual acceptance, it was held to be the duty of the bank to have notified the holder, as in case of non-acceptance, and, having failed to do this, the bank was liable for the amount.[2]

Although when a bill is made payable at a day certain, as at a fixed time after its date, presentment for acceptance before that time is not necessary in order to charge the drawer or indorsers, yet where a bank receives such a bill for collection, its duty is to present the bill for acceptance without delay. For it is to the owner's interest that the bill should be so accepted, as only by accepting it does the drawee become bound to pay it, and until such acceptance the owner has for his debtor only the drawer, and the step is one which a prudent man of business, ordinarily careful of his own interests, would take for his protection.[3]

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[1] Bank of Delaware County *v.* Broomhall, 38 Penn. St., 135; Ivory *v.* Bank of Missouri, 36 Mo., 475; Georgia Nat'l Bank *v.* Henderson, 49 Ga., 487.

[2] Walker *v.* New York State Bank, 9 N. Y., 582.

[3] Allen *v.* Suydam, 17 Wend., 368.

If the date of a note is so imperfect or obscure that it may be read as either of two dates—as, for instance, may be read either 5th or 15th—the bank should not undertake to interpret it out, but should get the holder to state which is the true date, or should make presentment so as to secure the holder's rights in either case.[1]

To Whom Notice of Dishonor Must be Given.—If the paper is dishonored, the bank must give due notice of such fact, so that the recourse of the customer against all prior parties hereto may be preserved.[2] Whether the bank is bound to give notice to all parties required to be notified in order to charge them with liability, or is bound to send notice only to the person from whom it received the paper, is a question not altogether free from doubt. But the weight of authority is that the bank is required to notify only its own immediate principal, unless there is some contract, express or implied, with the customer to give notice to all parties, or there is a custom to that effect.[3] In the leading case of Smedes *v.* Bank of Utica it was found that there was a local usage to give notice to all the indorsers of a note; and accordingly the bank, having failed to notify one of the indorsers from whom the amount might have been recovered if due notice had been given, was held liable to the customer for the loss. If for any reason notice to the indorsers is not necessary in order to charge

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[1] Bank of Delaware County *v.* Broomhall, 38 Penn. St., 135.

[2] Van Wart *v.* Wooley, 3 B & C., 419; Bank of Washington *v.* Triplett, 1 Pet., 25; Smedes *v.* Bank of Utica, 20 Johns., 371; 3 Cow., 662.

[3] Phipps *v.* Milbury Bank, 8 Metc., 79; State Bank *v.* Bank of the Capitol, 41 Barb., 343; Bank of United States *v.* Goddard, 5 Mason, 366.

them, the bank cannot be made liable for any neglect to notify them.[1]

Time in which Check Must be Presented.—The rule of the common law is that the collecting bank has until the close of banking hours on the next business day following that on which the check was received to present it for payment. The same time is allowed in which to forward the check when it is payable at a bank in another place. And the correspondent of the transmitting bank has likewise until the close of business on the day after receiving it to present it to the bank on which it is drawn. Thus, if the check is received by the collecting bank on Monday, that bank may wait until Tuesday to forward it to the correspondent bank, and the correspondent bank receiving the check, say, on Thursday, is not required to present it for payment until some time during banking hours on Friday.[2] But this rule of the common law may be modified by usage and custom. And where it is the uniform practice of the banks in a place to make an earlier presentment, customers would be justified in supposing that checks would be presented in accordance with this practice.[3]

Bank not Excused for Neglect by Fact that there Were no Funds.—Most of the controversies that have arisen between banks and their customers on account of the failure of the bank to make due presentment of checks have naturally been cases in which

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[1] West Branch Bank *v.* Fulmer, 3 Penn. St., 399.

[2] Hare *v.* Henty, 10 C. B., N. S., 65.

[3] See observations of Littledale and Parke, J. J., in Boddington *v.* Schlencker, 4 B. & Ad., 752,

the drawer became insolvent in the interval between the drawing of the check and the presenting of the same. In such a case it will not afford the collecting bank an excuse for its neglect to make proper presentment that there were not sufficient funds in the bank on which the check was drawn to meet it at maturity. That is not for the consideration of the agent. For it might well be that, had the check been presented and due notice of its dishonor given to the holder, an immediate demand on the debtor, with such legal measures as their business relations might render advisable, would have led to the payment of the instrument.[1]

Should not Procure Certification of Check.—A bank receiving a check for collection should require payment of it, and should not have it certified. For the certification of the check will operate as a payment as between the holder and the drawer, and release the latter from all liability for the amount; and, accordingly, the bank will be liable to the customer for having so negligently performed its duty that a party to the instrument was discharged from liability.[2]

Bank Required to do All that Holder Himself Would Do.—But the duty of the bank is not always discharged by making presentment and giving notice of dishonor, so as to secure and preserve the liability of all the parties thereto. The diligence required of the holder of paper in order to charge prior parties is not always the measure of the diligence due from the collecting bank to its customer. It is an agent for re-

[1] Bank of New Hanover *v.* Kenan, 76 N. C., 340.

[2] Essex County Nat'l Bank *v.* Bank of Montreal, 7 Biss., 193.

ward, and as such is bound to *do all that the owner of the paper himself would do if he were an ordinarily prudent and careful man.*[1] Thus it has been said by the New York Court of Appeals: "Suppose an agent receives for collection from the payee a sight draft. No circumstances can make it his duty, in order to charge the drawer, to present it for payment until the next day. He has entered into no contract with the drawer, is not employed or paid by him to render him any service, and owes him no duty to protect him from loss. What is required to be done to charge the drawer is simply a compliance with the condition attached to the draft, as if written therein; and that condition is in all cases complied with by presentation, demand, and notice on the next day after receipt of the draft. But suppose the agent, on the day he receives the draft, obtains reliable information that the drawee must fail the next day, and that the draft will not be paid unless immediately presented; what, then, is the duty he owes his principal, whose interest for a compensation he has agreed with proper diligence and skill to serve in and about the collection of the draft? Clearly, all would say, to present the draft at once; and if he fails to do this and loss ensues, he incurs responsibility to his principal; and yet the drawer would be charged if it was not presented until the next day."[2] And, as we have seen above, although presentment of a draft for acceptance in certain cases is not necessary in order to charge the drawer, yet the bank is bound to make such pre-

[1] Smith *v.* Miller, 43 N. Y., 172; 52 N. Y., 545; First Nat'l Bank of Meadville *v.* Fourth Nat'l Bank of New York, 77 N. Y., 320; 89 N. Y., 412.

[2] First Nat'l Bank *v.* Fourth Nat'l Bank, *supra.*

sentment, it being for the interest of the customer that this should be done.

Whether Paper Should be Sent Direct to the Bank which is to Make Payment.—It is a practice which appears to prevail to a wide extent among banks to send checks and drafts deposited for collection directly to the banks on which they are drawn. As to the propriety of this the courts are not agreed. In England and in New York they have sanctioned the practice.[1] But the Supreme Court of Pennsylvania, on the other hand, has held, in a recent case, that a bank on which a check is drawn is not a suitable agent to which to transmit the check for collection.[2] In the course of the opinion in this case it was said: "We think the principle may be stated as a true one that no firm, bank, corporation, or individual can be deemed a suitable agent, in contemplation of law, to enforce in behalf of another a claim against itself. * * * We interpret the cases to which we have referred as establishing the rule of transmission to a suitable correspondent or agent to mean that such suitable agent must, from the nature of the case, be some other than the party who is to make the payment. By no other rule can the rights of indorsers be protected if it is the interest of the party who is to make the payment to hinder, postpone, or defeat payment. This imposes no hardship on the institution undertaking to transmit for collection, which can always protect itself by stipulat-

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[1] Bailey *v.* Bodenham, 16 C. B., N. S., 295; Heywood *v.* Pickering, L. R. 9 Q. B., 428; Indig *v.* Nat'l City Bank, 80 N. Y., 100; Shipsey *v.* Bowery Bank, 59 N. Y., 491.

[2] Merchants' Nat'l Bank *v.* Goodman, 109 Penn. St., 422.

ing that special instructions by the depositor shall be given which will save the collecting bank from all risk or peril."

In view, therefore, of the conflict of judicial opinion on this point the safer course for the collecting bank is to transmit to some bank other than the one which is to make the payment, and where this cannot be done conveniently there should be some special agreement made with the customer.

Certified Check Should Not Be Sent to Certifying Bank.—But whatever may be the true rule in regard to checks and drafts generally, it would seem to be quite clear that *where a check has been certified* it should not be sent direct to the certifying bank, for by certifying the check such bank has become primarily liable for its payment, and would, therefore, be no more a suitable agent to make the collection than the maker of a note would be a suitable agent to collect from himself.[1] If the collecting bank has no proper agent at the place through which to make the collection, it should so inform the customer and act on his instructions. But if it takes the check without special stipulation, the customer is authorized to assume that it has a suitable agent to whom the paper may be transmitted, and that it will make the collection through such agent.[2]

Duty of Bank to Inquire After Paper Not Heard From.—Where paper transmitted is not heard from within a reasonable time, the duty of the collecting

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[1] Drovers' Nat'l Bank *v.* Provision Co., 117 Ill., 100.

[2] *Id.*

bank is to make inquiries concerning it and to notify the customer of the delay or loss; and failing to do this, the bank will be guilty of negligence, and will be liable to the customer for any injury occasioned to him thereby.[1] And it has been said that where a check or draft is forwarded directly to the bank on which it is drawn, this will not lessen, if, indeed, it does not increase, the diligence required of the collecting bank in this particular.[2] The fact that the bank transacts a large business will not relieve it from the duty of watching after every piece of paper which it has undertaken to collect.[3] A reasonable time for the bank to await advice concerning the paper before making any inquiry would be, in ordinary cases, the time required to receive an answer from the correspondent in the usual course of mail and according to the customary method of dealing between banks. In a case between two Colorado banks, in which neglect to inquire after paper not heard from was charged, the collecting bank sought to set up in defense an alleged custom of the Denver banks to rely wholly upon monthly statements, and not to inquire after remittances in the *interim* between such statements; but the evidence failed to establish such a custom, but showed, on the other hand, that banks in general were in the habit of so keeping their books as to have their attention called to a failure to receive advices, in order that they might institute the needful inquiries, unless upon the eve of the time when the

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[1] Shipsey *v.* Bowery Bank, 59 N. Y., 491; First Nat'l Bank of Trinidad *v.* First Nat'l Bank of Denver, 4 Dill., 290.

[2] First Nat'l Bank of Trinidad *v.* First Nat'l Bank of Denver, *supra.*

[3] *Id.*

monthly statement was due.[1] And such a course is plainly the only safe course for a bank to pursue.

Must Communicate to Correspondent Instructions of Holder.—When the customer gives the bank special instructions concerning the identity or place of residence of the party who is to make payment, it is the duty of such bank to transmit those instructions to the agent or correspondent to whom the paper is sent. And no custom can absolve the transmitting bank from this duty, it being of the very essence of the undertaking.[2]

Can Receive Only Money in Payment.—Like any other agent, the collecting bank can receive payment of the debt due its principal only in the legal currency of the country, or in bills which pass as money at their par value by the consent of the community.[3] It cannot take goods or commodities in payment, unless it has special authority so to do.[4] And if the bank receives payment in anything but money or its equivalent, its action will not operate to discharge the person making the payment, for, knowing the bank to be an agent for collection, such person is bound to inquire whether it has authority to accept payment in something else than money.[5]

Measure of Damages.—The measure of damages which the customer may recover of the collecting bank

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[1] First Nat'l Bank of Trinidad *v.* First Nat'l Bank of Denver, 4 Dill., 290.

[2] Borup *v.* Nininger, 5 Minn., 417.

[3] Ward *v.* Smith, 7 Wall., 447.

[4] Mudgett *v.* Day, 12 Cal., 139.

[5] *Id.*

for failure to properly perform its duty as collecting agent is the *actual loss which he has sustained. Prima facie* this loss is the amount of the bill or note; but the bank may show that the whole amount has not been lost to him.[1] It has been said by the Supreme Court of Minnesota: "The defendants may mitigate the damages by showing either the solvency of the maker or the insolvency of the indorser, or that the paper was partially or wholly secured, or any other fact that will lessen the actual loss to the plaintiff, the real loss occasioned by the improper conduct of the defendant being the fact for the jury to arrive at in measuring the plaintiff's damages."[2] And in the case of First National Bank of Meadville *v.* Fourth National Bank of New York it was said by Earl, J.: "In all these cases, the negligence of the agent being established, it is a question of damages; and the agent may show, notwithstanding his fault, that his principal has suffered no damages, and the recovery can then be for nominal damages only."

Insolvency Revokes Authority to Enter General Credit for Avails.—The general rule of agency that the bankruptcy of the agent operates as a revocation of his authority to receive money on account of his principal is applicable to banks acting as agents in the matter of collections, at least so far as the bank has been authorized to place the proceeds with its own funds and enter a general credit for the amount. Therefore, where a bank has received paper for collection, with authority to credit the customer with the proceeds when collected,

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[1] First Nat'l Bank *v.* Fourth Nat'l Bank, 77 N. Y., 320.

[2] Borup *v.* Nininger, 5 Minn., 523.

and before the collection is made such bank fails and suspends business, such failure and suspension will operate as a revocation of the authority given by the customer to mingle the avails of the paper with the general funds of the bank, so as to make the customer a general creditor; and if the collection is afterward made, either by the insolvent bank itself or by its agent or correspondent, the customer is entitled to the specific fund.[1] But where the customer is indebted to the bank, then, perhaps, the power given to enter a general credit is coupled with such an interest as to make it irrevocable.[2]

Duty Where Check Is Received in Payment.—Where a bank in making a collection receives in payment a check instead of money, its duty is to make presentment of the check to the bank on which it is drawn as soon as with reasonable diligence this can be done, and any delay so to do will be at the peril of the collecting bank.[3] And the bank would not be justified in holding such check for the purpose of sending it through the clearing-house in the ordinary course of business, unless, perhaps, the check could be presented in this way as soon as it could be in any other.[4] This question was very fully considered by the New York Court of Appeals in Smith *v.* Miller, which was before the court twice. The collecting agent in that case was

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[1] First Nat'l Bank of Crown Point *v.* First Nat'l Bank of Richmond, 76 Ind., 561.

[2] *Id.*

[3] Smith *v.* Miller, 43 N. Y., 172; S. C., 52 N. Y., 545; First Nat'l Bank of Meadville *v.* Fourth Nat'l Bank of New York, 77 N. Y., 320; S. C., 89 N. Y., 412.

[4] See cases cited in preceding note.

not a bank, but the principle there settled is equally applicable to a bank acting in that capacity, and was so applied in a case which subsequently arose between the First National Bank of Meadville, Pennsylvania, and the Fourth National Bank of New York. In Smith *v.* Miller the collecting agents received in payment of a draft the check of a firm of merchants about one o'clock in the afternoon, and, without presenting it for certification to the bank on which it was drawn, deposited it in another bank for collection, and by the latter bank it was sent through the clearing-house the next morning. In the mean time the drawers had failed, and when the check was received next morning by the bank on which it was drawn that bank refused to pay it. Held, that the agents were guilty of negligence in not presenting the check for payment or certification on the day they received it, although they had but two hours on that day in which to make such presentment.

In First National Bank of Meadville *v.* Fourth National Bank of New York the plaintiffs had sent to the defendants a sight draft for $6,000 drawn upon Culver, Penn & Co., bankers in the city of New York. The draft was regularly presented for payment on the morning it was received, and the drawees gave their check on the Third National Bank for the amount. This check the Fourth National Bank did not present to the Third National Bank on that day, but it was sent through the clearing-house in the regular course of business the next day. In the mean time Culver, Penn & Co. had failed, and when the check was received by the Third National Bank payment was refused. Upon these facts the Fourth National Bank was held to have been negligent in the performance of its duty. "The

rule as recognized," said Earl, J., "is not unjust or unreasonable or inconveniently uncertain. Here the defendant was bound to present this draft and demand the money thereon. It took a check. That placed in its hands the means of procuring the money at once. It should have presented the check for payment or certification as soon as with reasonable diligence it could, and the delay was at its peril."[1]

The case of *a check received in payment of paper which the bank has undertaken to collect* must not be confounded with that *where the check itself is the instrument deposited for collection.* In the latter case, as we have seen, the bank will ordinarily perform its duty if it presents the check before the close of business hours on the day following—that being considered as high a degree of diligence as could reasonably be expected, and being all that the bank has undertaken to do. But the rule as to the presentment of a check taken in payment is based upon another principle, viz., that one acting for another is not authorized to receive anything in payment except money, and that in taking a check he acts at his own peril, unless he exercises diligence in procuring the money upon it.

When Liable for Mistake of Law.—In general, the rules of law in regard to the presentment of bills of exchange and promissory notes for payment, and for

[1] On the second trial of this case the defendants sought to show a custom of collecting such checks through the clearing-house, but it was found that the evidence failed to show such a custom. "This practice prevailed only among banks making exchanges through the clearing-house. It did not prevail among other banks, or with savings-banks or trust companies, or with respect to checks on private bankers."

giving notice in case of dishonor, are so plain and simple and so well known by all within the line of whose business such duties come that any failure of a bank, acting in behalf of another, to comply with them would carry with it such proof of either want of skill or want of ordinary diligence as to render the bank liable to its customer. But for an honest mistake in a doubtful matter of law about which opinions may differ the bank will not be held responsible.[1] And where it follows the uniform custom of banks in such matters it will be protected, although the courts should afterward determine that the rule of law is different.[2] Thus, where a bank in Boston, following the usual custom of the banks in that city, protested a post note, without allowing grace thereon, and it was afterward determined by the Supreme Court of that State that post notes were entitled to grace, it was held that the bank, having followed the practice which had generally prevailed up to that time, was excusable.[3] But if, when the course to be adopted is doubtful, the rights of the customer can be secured in any event, as, for instance, by presenting paper on both dates, the duty of the bank is to proceed accordingly; and failing to do this, it will be liable for any mistake.[4]

Whether Liable for Neglect or Default of Correspondent.—Whether the collecting bank is responsible for the neglect or default of the correspondent or other agent to which it transmits paper payable in

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[1] Mechanics' Bank *v.* Merchants' Bank, 6 Metc., 13.
[2] *Id.*
[3] *Id.*
[4] Georgia Nat'l Bank *v.* Henderson, 49 Ga., 487.

another place is a point upon which the authorities do not agree. On the one hand, it is held that, in the absence of an express or implied contract varying such liability, the collecting bank is equally liable for the neglect or default of any such correspondent or other agent as it is for the neglect or default of one of its own officers. This is the rule adopted by the Supreme Court of the United States,[1] and by the courts of England,[2] New York,[3] Ohio,[4] Michigan,[5] and Montana.[6] It is illustrated by the case of the Exchange National Bank of Pittsburgh against the Third National Bank of New York,[7] decided by the Supreme Court of the United States in 1884. The Pittsburgh bank sent drafts drawn on a firm in Newark, N. J., to the New York bank for collection, which drafts were transmitted by the latter bank to its correspondent in Newark, the First National Bank of that place. The Newark bank failed to give notice that the drafts were not properly accepted, and the New York bank was held liable for the loss thereby occasioned to the bank in Pittsburgh. And this liability of the collecting bank will extend to any neglect or default on the part of any agent employed by any of its correspondents, no matter how far removed from it that agent may be. Thus, where A deposited with a New

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[1] Exchange Nat'l Bank *v.* Third Nat'l Bank, 112 U. S., 276.

[2] Van Wart *v.* Woolley, 3 B. & C., 439; Mackersy *v.* Ramsays, 9 Cl. & F., 818.

[3] Allen *v.* Merchants' Bank, 22 Wend., 215; Montgomery County Bank *v.* Albany City Bank, 7 N. Y., 459; Commercial Bank *v.* Union Bank, 11 N. Y., 203.

[4] Reeves *v.* State Bank, 8 Ohio St., 465.

[5] Simpson *v.* Walby, 30 N. W. Rep., 199.

[6] Power *v.* First Nat'l Bank, 6 Mont., 251.

[7] 112 U. S., 276.

York bank for collection a draft drawn on a firm in Philadelphia, and the New York bank sent the draft to a bank in Philadelphia, and the Philadelphia bank delivered it to a notary, who failed to give notice of its non-acceptance to the indorsers, so that they were discharged from liability thereon, the New York bank was held liable to A for this neglect of the notary of the Philadelphia bank.[1] So, where bankers in Edinburgh, employed to obtain payment of a bill drawn on Calcutta, transmitted it to their correspondent in London, who forwarded it to a house in Calcutta, to whom it was paid, but who failed while the funds were in their hands, it was held that the bankers in Edinburgh were liable to their customer for the amount.[2]

On the opposite hand, it is held by other courts that, where the employment of a correspondent or other agent is necessary or customary, the duty of the collecting bank is fully discharged if it exercises reasonable care in the selection of such correspondent or other agent, and that when the paper has been duly transmitted with the necessary instructions to a suitable agent at the place where it is payable the transmitting bank will not be liable for any neglect or default of such agent. This is the rule in Massachusetts,[3] Connecticut,[4] Illinois,[5] Iowa,[6] Wisconsin,[7] Missouri,[8] and Tennessee.[9]

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[1] Allen *v.* Merchants' Bank, 22 Wend., 215.
[2] Mackersy *v.* Ramsays, 9 Cl. & F., 818.
[3] Dorchester Bank *v.* New England Bank, 1 Cush., 177.
[4] East Haddam Bank *v.* Scovil, 12 Conn., 303.
[5] Ætna Ins. Co. *v.* Alton City Bank, 25 Ill., 243.
[6] Guelich *v.* Nat'l City Bank, 56 Iowa, 434.
[7] Stacy *v.* Dane County Bank, 12 Wis., 629.
[8] Daly *v.* Butchers' and Drovers' Bank, 56 Mo., 94.
[9] Bank of Louisville *v.* First Nat'l Bank, 8 Baxter, 101.

This disagreement as to the liability of the collecting bank grows out of the different views which the courts, on the one side and the other, respectively, take as to the nature of the implied contract between such bank and the owner of the paper. By the New York courts and those which have followed their lead the collecting bank is regarded as an independent contractor, and the instruments employed by it in making the collection are regarded as its agents, and not the subagents of the customer. This view was very clearly explained by Justice Blatchford in delivering the opinion of the United States Supreme Court in the Exchange National Bank *v.* The Third National Bank.[1] He said, among other things: "The contract, then, becomes one to perform certain duties necessary for the collection of the paper and the protection of the holder. The bank is not merely appointed an attorney, authorized to select other agents to collect the paper. Its undertaking is to do the thing, and not merely to procure it to be done. In such case the bank is held to agree to answer for any default in the performance of its contract; and whether the paper is to be collected in the place where the bank is situated or at a distance, the contract is to use the proper means to collect the paper, and the bank, by employing subagents to perform a part of what it has contracted to do, becomes responsible to its customer. * * * Whether a draft is payable in the place where the bank receiving it for collection is situated or in another place, the holder is aware that the collection must be made by a competent agent. In either case there is an implied contract of the bank that the proper measures shall be used to collect the draft, and a right,

[1] 112 U. S., 276.

on the part of its owner, to presume that proper agents will be employed, he having no knowledge of the agents. There is, therefore, no reason for liability or exemption from liability in the one case which does not apply to the other. And, while the rule of law is thus general, the liability of the bank may be varied by consent, or the bank may refuse to undertake the collection. It may agree to receive the paper only for transmission to its correspondent, and thus make a different contract and become responsible only for good faith and due discretion in the choice of an agent. If this is not done, or there is no implied understanding to that effect, the same responsibility is assumed in the undertaking to collect foreign paper and in that to collect paper payable at home. On any other rule no principal contractor would be liable for the default of his own agent, where from the nature of the business it was evident he must employ subagents."

The Massachusetts court, on the other hand, and the other courts which have adopted a like line of reasoning take an entirely different view of the implied contract between the parties. According to their conception of the undertaking of the bank, it is not absolutely to make the collection, but merely to perform properly such duties as banks in like cases usually perform themselves, and to select suitable subagents to perform those further duties which, from the necessities of the case or the custom of banks, it is to be expected will be committed to others. In other words, the contract is only for the immediate services of the bank, and for its faithful conduct in selecting suitable subagents for its principal, the owner of the paper.

Liability Extends to Failure of Agents to Pay Over Proceeds.—The liability of the collecting bank, under the first-mentioned rule, extends to any failure of its agents to account for or pay over the proceeds after the collection is made, as well as to any failure to duly present the paper or give proper notice of dishonor.[1] Thus, in the English case of Mackersy *v.* Ramsays, before referred to, the collection had been duly made by the house in Calcutta, which was acting as the agent of Coutts & Co., the London correspondents of Ramsay & Co., but the money was lost by the subsequent failure of the Calcutta firm. It was held by the House of Lords that Ramsay & Co. were liable to their customer for the amount. In the course of his opinion in this case Lord Cottenham said: "I cannot distinguish this case from the ordinary transactions between parties having accounts between them. If I send to my bankers a bill or draft upon another banker in London, I do not expect that they will themselves go and receive the amount and pay me the proceeds, but that they will send a clerk in the course of the day to the clearing-house and settle the balances in which my bill or draft will form one item. If such clerk, instead of returning to the bankers with the balance should abscond with it, can my bankers refuse to credit me with the amount? Certainly not. If the bill had been drawn upon a person at York, the case would have been the same, although, instead of the bankers employing a clerk to receive the amount, they would probably employ their correspondent at York to do so; and if such correspondent received the amount, am I to

[1] Mackersy *v.* Ramsays, 9 Cl. & F., 818; Simpson *v.* Walby, 30 N. W. Rep., 199; Power *v.* First Nat'l Bank, 6 Mont., 276.

be refused credit because he afterward became bankrupt while in debt to my bankers? If the balance were not in favor of my bankers, the question would not arise, so that my title to the credit would depend upon the state of the account between my bankers and their correspondent. The amount in money was received by the correspondent of my bankers at York; as between me and them, it was received by them, and nothing which might subsequently take place could deprive me of the right to have credit with them for the amount."

When Bank to Which Paper Is Sent Is Agent to Receive Proceeds.—But before the collecting bank can be held as guarantor of the solvency of the bank to which the paper is sent, it must, either expressly or by implication, have constituted that bank its agent to receive the proceeds. Of course, such an agency must necessarily be inferred where it is expected that the money is to be paid to the correspondent bank, and by that bank transmitted to the collecting bank or credited on account. But where the paper is sent by mail directly to the bank which is to make the payment, with a request to remit the amount, the bank so sending the paper does not constitute the other bank its agent to receive the proceeds, and though the latter bank, having funds of the drawer of the paper, and charging it to his account as paid, fails to pay it over to the collecting bank, the collecting bank is not responsible to its customer for the amount, unless there has been some negligence. By sending the paper to the bank which is to make the payment, the collecting bank requests it to pay the amount, and not to receive it. The object is to extract money from the drawee bank, and not to place

funds in its possession as agent of the collecting bank. It has nothing to do but pay the instrument if in funds, and, if not in funds, to refuse to pay. The relation created between the two banks is not different from that which would have resulted had the collecting bank made demand by its messenger or by one of its officers.[1]

Whether Liable for Neglect of Notary.—As to whether the collecting bank can be held liable when a notary to whom it has delivered the paper fails to make proper presentment or give due notice of dishonor, there is even less uniformity of judicial opinion than on the question of its liability for the neglect or default of a correspondent. In New York,[2] New Jersey,[3] South Carolina,[4] and Kansas[5] the bank has been held liable for the neglect of the notary. But in all of these cases it has been pointed out by the courts that the duties which the notary failed to properly perform were not necessarily committed to such an officer, but were such as any clerk or employé of the bank could have discharged. For any negligence in the performance of such duties as *the law requires to be performed by a notary*, *e. g.*, the protesting of a foreign bill of exchange, the bank would not, of course, be held answerable.[6]

The contrary rule, that the bank is not responsible for the acts of the notary when it exercises due care in the

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[1] Indig *v.* Nat'l City Bank, 80 N. Y., 100.
[2] Ayrault *v.* Pacific Bank, 47 N. Y., 570.
[3] Titus *v.* Mechanics' Nat'l Bank, 35 N. J. Law, 588.
[4] Thompson *v.* Bank of South Carolina, 3 Hill (S. C.), 77.
[5] Bank of Lindsborg *v.* Ober & Hagerman, 31 Kans., 599.
[6] See Commercial Bank of Kentucky *v.* Varnum, 49 N. Y., 269.

selection of such an officer, prevails in Massachusetts,[1] Maryland,[2] Ohio,[3] Mississippi,[4] and Louisiana,[5] and this rule was adopted by the Supreme Court of the United States in a case coming to that court from Mississippi.[6] In Massachusetts the decisions are based upon a uniform local practice of bankers to place paper received for collection in the hands of a notary for presentment and protest. In the other States mentioned the courts proceed upon the ground that the notary is a public officer, wholly independent of the bank, and specially authorized by the State laws to make presentment of negotiable instruments and protest them when dishonored. And it was upon this ground that the Supreme Court of the United States put its decision in the case of Britton *v.* Niccolls. In the course of the opinion in that case it was said by Justice Field: "Judged by the law of Mississippi, the bankers, Britton & Koontz, discharged their duty to the plaintiff when they delivered the notes received by them for collection to the notary public. There is no question as to his qualifications. He was not connected in business with the bankers, nor employed by them except in his official character. * * * He was a public officer whose duties were prescribed by law; and when the notes were placed in his hands in order that such steps should be taken by him as would bind the indorsers if the notes were not paid, he became the agent of the holder of

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[1] Warren Bank *v.* Suffolk Bank, 10 Cush., 585.
[2] Citizens' Bank *v.* Howell, 8 Md., 530.
[3] Bank *v.* Butler, 41 Ohio St., 519.
[4] Bowling *v.* Arthur, 34 Miss., 41.
[5] Baldwin *v.* Bank of Louisiana, 1 La. Ann., 13.
[6] Britton *v.* Nicholls, 104 U. S., 757.

the notes. For any failure on his part to perform his whole duty he alone was liable; the bankers were no more liable than they would have been for the unskillfulness of a lawyer of reputed ability and learning, to whom they might have handed the notes for collection, in the conduct of a suit brought upon them."

CHAPTER XV.

THE BANKER'S LIEN.

General Nature of the Banker's Lien.—The banker's general lien is a right to retain the moneys and securities of his customer for a general balance of accounts.[1] This lien is founded upon custom; but it has been long since so well established that it is judicially noticed by the courts, like any other part of the law-merchant, and is not required to be proved.[2] By a particular agreement this lien may be excluded; but an express agreement is not essential to its origin or continuance. Ordinarily it attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business for advances which are supposed to be made upon their credit.[3] And not only

[1] Davis *v.* Bowsher, 5 T. R., 488; Brandao *v.* Barnett, 12 Cl. & F., 786; Jourdaine *v.* Lefevre, 1 Esp., 66; Jones *v.* Peppercorne, 28 L. J., Ch., 153; Bank of Metropolis *v.* New England Bank, 1 How., 234; 6 *id.*, 212; Nat'l Bank *v.* Insurance Company, 104 U. S., 54; Miller *v.* Farmers' and Mechanics' Bank, 30 Md., 392; *In re* Tallassee Manufacturing Co., 64 Ala., 567; Muench *v.* Valley Nat'l Bank, 11 Mo. App., 144.

[2] Brandao *v.* Barnett, *supra*.

[3] See cases cited in note 1.

does it attach against the depositor, but also against the unknown equities of all others in interest.[1] "It is given by the law upon the presumption that it is upon the faith of moneys and securities coming into the possession of the banker in the course of general dealings not especially devoted to other uses a balance is suffered to accumulate against the customer."[2]

There Must Be a Balance Due and Payable.—Before the bank can withhold any of the funds or securities of a customer in virtue of its general lien, there must be a debt due and payable; there is no lien for a debt not matured.[3] Thus, where a customer has procured a discount of a bank the bank cannot hold any part of his deposit to meet his obligation until the paper becomes due and payable; but after the paper discounted falls due, then, if it remains unpaid, the bank may, unless other rights have intervened, hold a balance of deposits and apply it toward the payment of the paper.[4] The Virginia case of Ford's Executor *v.* Thornton[5] has sometimes been cited as an authority for the proposition that a bank may withhold a deposit for the immature indebtedness of an insolvent customer; but the decision in this case was not put upon the ground that the bank had a lien, but was decided upon the entirely different principle of equitable set-off, which is applicable to other creditors as well as to bankers. And in a recent case

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[1] Bank of Metropolis *v.* New England Bank, 1 How., 234.

[2] Per Brickell, C. J., in *In re* Tallassee Manufacturing Co., 64 Ala., 567.

[3] Jordan *v.* Nat'l Shoe and Leather Bank, 74 N. Y., 467; Manufacturers' Nat'l Bank *v.* Jones, 2 Pennypacker, 377.

[4] Jordan *v.* Nat'l Shoe and Leather Bank, *supra*.

[5] 3 Leigh, 695.

in the Supreme Court of Pennsylvania it was held that the insolvency of the customer could not operate to give the bank a lien as against a creditor attaching the fund.[1]

Credit Must Have Been Given.—To sustain the lien there must have been a credit given or value paid or some risk or responsibility incurred upon the faith of the securities.[2] And where the circumstances of the deposit or the course of the dealings between the parties are such that it cannot be fairly inferred that this was done, no lien will exist.[3] But this credit may be given upon the paper which it is expected will be transmitted in the usual course of the dealings between the parties.[4] A balance allowed to stand will be such a credit. On this point Chief-Justice Taney, in delivering the opinion of the Supreme Court of the United States in Bank of Metropolis *v.* New England Bank, said: "We do not perceive any difference in principle between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case, as well as the other, credit is given upon the paper deposited, or expected to be transmitted in the usual course of the transactions between the parties."

Banker's General Lien Not Favored.—The banker's general lien is no exception to the rule that general liens are not favored at law, and will be upheld

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[1] Manufacturers' Nat'l Bank *v.* Jones, 2 Pennypacker, 377.

[2] Bank of Metropolis *v.* New England Bank, 1 How., 234; 6 *id.*, 212; Miller *v.* Farmers' and Mechanics' Bank, 30 Md., 392; Milliken *v.* Shapleigh, 36 Mo., 596.

[3] Brandao *v.* Barnett, 12 Cl. & F., 786; Milliken *v.* Shapleigh, *supra.*

[4] Bank of Metropolis *v.* New England Bank, *supra.*

only in clear cases. And it may be stated as a uniform rule that this lien will not be held to attach in any case where the circumstances are such that the inference may be fairly drawn that the parties did not intend it should attach.

The Intention of the Parties.—And here it is to be remarked that the controlling factor in each case is the intention of the parties; and it is the effort of the courts to ascertain this intention and to carry it into effect. If there is no express contract, or if there are no circumstances that show an implied contract inconsistent with the lien, it will be held to attach; for in such case the inference must be that the parties contracted with reference to a uniform practice which prevails in the dealings between banks and their customers. But where there is some special agreement or other circumstances with which the lien is inconsistent, then the inference is that the parties did not intend it should attach. And, therefore, it is to be observed that all the other rules on the subject are merely subsidiary to the principal inquiry, What was the intention of the parties?

Lien Will Not Attach to Deposits Impressed With a Trust.—The lien will not attach to deposits impressed with a trust—that is to say, as previously explained, to moneys or securities deposited for the purpose of being applied to some special object.[1] For in such case, the bank having undertaken to apply the deposit to a special purpose or in a particular manner,

[1] Nat'l Bank *v.* Insurance Company, 104 U. S., 54; United States Bank *v.* Macalester, 9 Barr, 475; Baker *v.* New York Nat'l Exchange Bank, 100 N. Y., 32; Nat'l Bank of Fishkill *v.* Speight, 47 N. Y., 668.

the application of it to an indebtedness due to the bank itself would be inconsistent with that undertaking. Therefore, it was held in a leading case in Pennsylvania that where a bank had received money from a State for the purpose of paying coupons of the State bonds, made payable at such bank, such money could not be applied to the payment of a prior undischarged indebtedness of the State to the bank.[1] So, where agents deposited money with a bank in their own firm name, but for the benefit of their principals, which purpose was understood by the bank, it was held that the bank could not retain any part of this deposit to cover an indebtedness due it from the agents.[2] And, likewise, where a deposit is made for the purpose of meeting a certain check and is so received by the bank, the bank cannot apply the amount on the balance due from the customer for whose account the deposit is made.[3]

Nor Where Deposit Is Not in the Usual Course of Business.—It is not to all property of the customer in the possession of the bank that the lien will attach, but only to such as comes into its possession in the usual course of the dealings between them as banker and customer.[4] Therefore, where a customer accidentally left a lease with his banker after the latter had refused to advance money upon it, the court held that the banker had no lien.[5] And so, it was held in a recent case that where a note had been left with a bank for discount,

[1] United States Bank *v.* Macalester, 9 Barr, 475.

[2] Baker *v.* New York Nat'l Exchange Bank, 100 N. Y., 32.

[3] Straus *v.* Tradesmen's Nat'l Bank, 36 Hun, 451.

[4] Brandao *v.* Barnett, 12 Cl. & F., 786; Lucas *v.* Darrien, 7 Taunt., 278; Petrie *v.* Myers, 54 How. Pr., 513.

[5] Lucas *v.* Darrien, *supra.*

which was refused, the bank could not hold the note for a balance due from the customer.[1] The leading case on this point is the English case of Brandao *v.* Barnett, decided by the House of Lords in 1846, after it had been elaborately considered by both the Courts of Common Pleas and the Exchequer Chamber. The essential facts in the case were as follows: Brandao was a Portuguese merchant, and Barnett and his partners were bankers in London. Edward Burn, a London merchant, was the agent and correspondent of Brandao, and upon the latter's direction invested the funds of his principal in exchequer bills, which bills he kept in tin boxes under his own lock, and left the boxes in the banking-house of the defendants for safe-keeping. When it became necessary to collect the interest on the bills and exchange them for new bills he delivered them to the defendants for this purpose, and when this was done he obtained the new bills from the defendants when he next called at the banking-house, which generally happened within a week or fortnight after the receipt of the bills by the defendants; and when he so obtained them, he locked them in a tin box as before, where they remained until wanted. Finally, after he had on one occasion so delivered the bills to the defendants, and on account of illness had allowed them to remain in their possession for a longer time than usual, Burn failed, and the defendants claimed to have a lien upon the bills for payments made for his account while the bills were in their possession, the bills being negotiable, and the defendants having no knowledge that they were not the property of Burn. But after elaborate argument by counsel on both sides, and long and

[1] Petrie *v.* Myers, 54 How. Pr., 513.

full consideration on the part of the law lords, it was held that there was no lien. In the course of his opinion in this case Lord Campbell said: "Now, it seems to me that in the present case there was an implied agreement on the part of the defendants inconsistent with the right of lien which they claim. It should be recollected that the exchequer bills for which the action is brought are the new exchequer bills which the defendants obtained for the express and only purpose of being delivered by them to Burn, that he might deposit them in the tin box, of which he kept the key. They not only were not entered in any account between Burn and the defendants, but they were not to remain in the possession of the defendants; and the defendants, in respect of them, were employed merely to carry and hold till the deposit in the tin box could be conveniently accomplished. Whether this deposit was to be made in the same hour in which the securities were obtained from the government, without ever being placed in a drawer belonging to the defendants, or after the lapse of some days, seems to me quite immaterial, bearing in mind the purpose for which they were obtained and for which they remained in the defendants' possession. Nor can it make any difference that, on the particular occasion out of which this action originated, from the illness of Burn, so long a time elapsed from the obtaining of the securities without their being demanded by him for the purpose of being locked up in the tin box; for if the defendants had not a right of lien upon them the moment they obtained them, the actual lien clearly could not afterward be claimed when his account had been overdrawn. Nor, I presume, can any weight be attached to the circum-

stance that the tin box in which the exchequer bills were to be locked up, and of which Burn kept the key, remained in the house of the defendants. Were not these exchequer bills obtained by the defendants to be delivered to Burn, who was himself to be the depositary and custodian of them? Bankers have a lien on all securities deposited with them as bankers; but these exchequer bills cannot be considered to have been deposited with the defendants as bankers. * * * This judgment will leave untouched the rule that bankers have a general lien on securities deposited with them as bankers, but will prevent them from successfully claiming a lien on securities delivered to them for a special purpose inconsistent with the existence of the lien claimed."

Upon the authority of this and other cases, it may be stated as the rule, that a bank will not have a lien upon the property of a customer left with it as a special deposit for safe-keeping, unless the parties have specially agreed that there shall be such a lien.[1]

Nor Where Securities Are Deposited for a Certain Debt or for Debts to a Fixed Amount.— Where securities are pledged to a bank for the payment of a particular loan or debt, the bank will have no lien upon such securities for a general balance, or for the payment of other claims.[2] Thus, where a broker deposited railroad bonds to secure his note for $8,000, it was

[1] O'Connor *v.* Majoribanks, 4 M. & G., 435; *Ex parte* Eyre, 1 Ph., 235.

[2] Duncan *v.* Brennan, 83 N. Y., 487; Wyckoff *v.* Anthony, 90 N. Y., 442; *In re* Medewe's Trust, 26 Beav., 588; Vanderzee *v.* Willis, 3 Bro. Ch., 21; Earl of Strathmore *v.* Vane, L. R. 33 Ch. Div., 586.

held that the bonds could not be retained to pay his indebtedness on another account.[1] And where the pledge is made to cover any indebtedness of the customer *up to a certain amount*, the securities cannot be held by the bank for any indebtedness beyond that amount; for as the express terms of the pledge limit it to a certain sum, it would be inconsistent with those terms that the bank should hold the securities for something more.[2]

The Equities of Third Persons.—As has been said, the lien attaches in favor of the bank, not only against the depositor but against the unknown equities of third persons.[3] If money deposited by an agent in his own name is in fact the money of his principal, yet the bank may have its lien upon this deposit, unless it has notice, either actual or constructive, of the fact of the ownership.[4] In the same way, it may have a lien on trust funds deposited by a trustee in his own name.[5] And where bills are transmitted for collection, if these are received and treated by the receiving bank as the property of the forwarding bank, and the former bank has no notice, either from the form of the indorsement or otherwise, that the bills do not in fact belong to such bank, it may retain the paper against the real owner.[6] The leading case on this subject is Bank of Metropolis *v.* New England Bank. This case came before the Supreme Court of the United States twice, once in 1843

[1] Wyckoff *v.* Anthony, 90 N. Y., 442.

[2] Earl of Strathmore *v.* Vane, L. R. 33 Ch. Div., 586.

[3] Bank of Metropolis *v.* New England Bank, 1 How., 234; 6 *Id.*, 212; Brandao *v.* Barnett, 12 Cl. & F., 786.

[4] National Bank *v.* Insurance Co., 104 U. S., 54.

[5] School District *v.* First Nat'l Bank, 102 Mass., 174.

[6] Bank of Metropolis *v.* New England Bank, *supra.*

and again in 1848. The Bank of the Metropolis, in the District of Columbia, had been for a long time dealing and corresponding with the Commonwealth Bank of Massachusetts, which failed on the 13th day of January, 1838. They had mutually remitted for collection such bills, etc., as either might have, which were payable in the vicinity of each other, which, when paid, were credited to the party sending them in the account-current kept by both banks and regularly transmitted from one to the other; and they regularly settled upon these principles, charging postage, protests, etc., the balance being sometimes in the favor of one and sometimes of the other. On the 24th of November, 1837, the Bank of the Metropolis owed the Commonwealth Bank $2,200, and in the latter part of that year the Commonwealth Bank sent to the Bank of the Metropolis for collection in the usual way sundry paper which would fall due in February, March, April, May, and June following. This was indorsed by E. P. Clark, cashier, who was cashier of the New England Bank, payable to C. Hood, cashier, who was cashier of the Commonwealth Bank, and by him to G. Thomas, cashier, who was cashier of the Bank of the Metropolis. On the day the Commonwealth Bank failed its cashier wrote a letter to the Bank of the Metropolis directing it to hold the paper that had been so forwarded "subject to the order of the cashier of the New England Bank, it being the property of that institution." The New England Bank sued the Bank of the Metropolis for the proceeds of all the paper so sent, and the court below gave judgment for the New England Bank. The cashier of the Commonwealth Bank testified that they were never the property of the Commonwealth Bank,

nor had the bank any interest therein; but they were at the time of the receipt thereof, and ever after, the property of the New England Bank, and subject to its order and control. At this time the Commonwealth Bank was indebted to the Bank of the Metropolis about $2,900. These notes, etc., were indorsed by the cashier of the New England Bank without consideration, and were placed in the hands of the Commonwealth Bank for the mere purpose of collection. The law applicable to the subject was stated by Chief-Justice Taney to be, that if the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills and notes in question, and that it transmitted them for collection merely as agent, then the Bank of the Metropolis was not entitled to retain them against the New England Bank for the general balance of the account of the Commonwealth Bank; but if the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and upon the credit of such remittances made or anticipated in the usual course of dealings between them balances were from time to time suffered to remain in the hands of the Commonwealth Bank, then the Bank of the Metropolis was entitled to retain the paper for the balance of account due from the Commonwealth Bank.

Form of Indorsement May Convey Notice.— The form of the indorsement may be sufficient notice that the paper does not belong to the transmitting bank. Thus, where paper is indorsed "for collection," the bank to which such paper is sent cannot have a lien on

it against the real owner; for this form of indorsement conveys an intimation that the paper does not belong to the transmitting bank, and that such bank is merely the agent of the owner.[1]

In Some States No Lien for Pre-existing Debt.— In this connection it is to be observed that, in those States in which a pre-existing debt is not a sufficient consideration to constitute the person acquiring negotiable paper a *bona fide* holder for value, the bank can have no lien as against the antecedent equities of third persons on paper coming into its possession for any indebtedness previously incurred.[2] Nor will the case be altered by a long course of dealing between the parties by which the bank has allowed a balance to stand on the faith of the securities to be afterward transmitted.[3]

Bank Not Protected if Securities Are Non-Negotiable.—But it is to be borne in mind that the lien of the bank will attach as against the equities of third persons only where the deposit of the customer consists of money or negotiable securities. As to non-negotiable securities, the bank would be in no better position than any other holder for value, and could have no better title to them than had its transferror.[4]

Where There Are a Number of Accounts.—

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[1] Cecil Bank *v.* Farmers' Bank, 22 Md., 148; Bank of Metropolis *v.* First Nat'l Bank, 22 Blatch., 58.

[2] McBride *v.* The Farmers' Bank, 26 N. Y., 450; Appeal of the Leggett Spring and Axle Company, 111 Penn. St., 291.

[3] McBride *v.* The Farmers' Bank, *supra.*

[4] Manningford *v.* Toleman, 1 Coll., 670; Stackhouse *v.* Countess of Jersey, 39 L. J., Eq., 421.

It frequently happens that a customer, particularly when the customer is another bank, has a number of accounts with the bank, as, for instance, a loan, a discount, and a general account; and in such case if the customer deposits with the bank securities without stipulating that they shall be applicable on only one account, and there are no circumstances to show that this was the intention of the parties, the bank may hold the securities for the general balance.[1]

Deposit and Debt Must Be in Same Right.—The bank can have a lien only where the person who is both depositor and debtor stands in both the characters alike, in precisely the same relation and on precisely the same footing toward the bank.[2] And, therefore, a bank would have no lien on the individual deposit of a partner for a balance due the bank from his firm.[3] So, a deposit made by one in his fiduciary capacity cannot be held for his individual indebtedness.[4] Nor, on the other hand, can his individual deposit be held for the indebtedness of his principal or *cestui que trust.*[5]

Taking Other Security.—The bank will destroy its right of lien if, after the lien has been established, security which is payable at a distant day is taken for the debt.[6]

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[1] *In re* European Bank, L. R. 8 Ch. App., 41.

[2] Watts *v.* Christie, 11 Beav., 546; International Bank *v.* Jones, 119 Ill., 407.

[3] See cases cited in preceding note.

[4] *Ex parte* Kingston, L. R. 6 Ch. App., 632. In cases of this kind the question usually is whether the bank has had notice that the funds are trust funds.

[5] Swartwout *v.* Mechanics' Bank, 5 Denio, 555.

[6] Cowell *v.* Simpson, 16 Ves., jr., 278.

PART II.

BANK OFFICERS.

CHAPTER I.

DIRECTORS.

The management of the affairs of an incorporated bank is usually committed, by the charter or the general banking laws under which the bank is organized, to a board of directors, or, as they are sometimes called, trustees or managers. The directors have power to act for the institution in any matters pertaining to its regular business. They have, in general, power to control all the property of the bank, to make discounts, to borrow money for the use of the bank, to transfer and assign its property, to appoint its officers and agents and prescribe their duties, and, in short, to exercise all the powers conferred upon the bank which are fairly within the scope of its regular and ordinary business.[1] And this power is exclusive even of the shareholders. Thus, the shareholders could not by resolution authorize a transfer of the bank's property; this can be done only through the directors. So, the board of directors alone is empowered to declare dividends; the shareholders have no power to direct a distribution of the profits.

[1] Burrill *v.* Nahant Bank, 2 Metc. (Mass.), 163; Hoyt *v.* Thompson, 19 N. Y., 207; Dana *v.* Bank of U. S., 5 W. & S., 223; Bank of U. S. *v.* Dunn, 6 Peters, 51; Merick *v.* Metropolis Bank, 8 Gill, 59.

But except they are authorized to do so by the statutory laws by which the bank is governed, the directors cannot bind the bank by acts done outside of the regular business. Thus, they cannot increase or reduce the amount of capital stock, or wind up the business, or sell its property so as to disable it from carrying on its business. These and all similar matters are to be determined by the shareholders, unless the Legislature has provided otherwise.[1]

Term of Office.—The charters of banks and general banking laws commonly prescribe that the directors shall be elected for a certain definite term, usually one year. But it is not understood that the effect of such a provision is to require a director to serve for the whole term for which he is elected, and to prohibit him from resigning during such term. Accordingly, it was held in a recent case that a director of a national bank might resign at any time during the year. And the court said that the apparent purpose of the provision of the national banking laws in regard to the term of office is to make it conform to the time of the new election, and not to absolutely require every director to serve the full term.[2]

The resignation of a director should be tendered to the board, and not to the shareholders. As the president is the head of the board, the resignation may be tendered to him.[3]

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[1] Percy *v.* Millaudon, 8 Martin (N. S.), 68; Bank Commissioners *v.* Bank of Brest, 1 Harring. Ch. (Mich.), 106; Gibson *v.* Goldthwaite, 7 Ala., 281.

[2] Movius *v.* Lee, 30 Fed. Rep., 298.

[3] *Id.*

Can Act Only As a Board.—The directors must act as a board, and not singly. And the mere fact that persons are directors will not enable them to bind the bank by acts done independently of the other members of the board. Oftentimes, it is true, a single director when acting alone may represent the bank in various matters; but in such case his power is not simply in virtue of his office—a power inherent in the office of director—but is derived from another circumstance, viz., that he has been authorized by the board to act as the agent of the bank in such matters. In a recent case in the Supreme Court of Kansas it was said: "The election of an individual as a director does not constitute him an agent of the corporation with authority to act separately and independently of his fellow members. It is the board duly convened and acting as a unit that is made the representative of the association. The assent or determination of the members of the board acting separately and individually is not the assent of the corporation. The law proceeds upon the theory that the directors shall meet and counsel with each other, and that any determination affecting the association shall be arrived at and expressed only after a consultation at a meeting of the board attended by at least a majority of its members." [1]

This principle is elementary in the law of corporations, and is sustained by a great number of adjudications.

Cannot Exclude Co-Director from Access to Bank's Records.—Every director has the right to know how the affairs of the bank are conducted, and

[1] Nat'l Bank *v.* Drake, 35 Kans., 564.

about the action of his co-directors in their management of the institution; and, therefore, the majority cannot exclude one of their number from access to the books and records of the bank. Accordingly, it has been held that a by-law which was aimed at a single member, and was intended to prevent him inspecting the discount book, was invalid; and it was held to be no defense to the action of the majority that they considered the particular director hostile to the institution and its interests.[1]

Presumed to Know Condition of Bank.—It is a presumption of law that the directors have a knowledge of the transactions, business, and condition of the bank, which presumption is conclusive upon them, and against the existence of which, as a matter of fact, no testimony will be received. It being their duty to have such knowledge, they will not be permitted to plead ignorance, and thereby profit by their neglect of duty. Accordingly, where a director had sold his stock at a time when the bank was insolvent, and had taken in payment a check upon the bank drawn by a person who had no funds to his credit, it was held that he was presumed to know the condition of the bank, and also the fact that the drawee of the check had no funds on deposit. The court said: "While we assume, as a matter of fact, that the defendant knew nothing of the condition or management of said bank, and nothing of the condition of Herman's account with the bank, yet still as a matter of law we think we must presume that he knew all about these matters. He was a director and the vice-president of the bank, and it was his duty

[1] People *v.* Throop, 12 Wend., 183.

to have such knowledge, and therefore the law will conclusively presume that he had it. He cannot now, as against the interests of the bank and its stockholders and perhaps its creditors, be allowed to plead ignorance and innocence, and thereby profit by his own want of knowledge and by his own failure to do his duty as an officer of the bank. Such would be against both morals and law. Of course, we do not hold that a director is bound to know everything that transpires in a bank, and at the very time when it occurs. But we do hold that a director, having personal and private dealings with his bank, is bound to know (so far as the same affects his personal dealings) the general condition and management of his bank and everything of importance that occurs therein, either at the time it occurs or soon thereafter."[1]

Likewise, in United Society of Shakers *v.* Underwood[2] it was held by the Court of Appeals of Kentucky that the directors of the bank were presumed to have had notice that bonds left with the bank as a special deposit had been sold by the bank officers and the money applied to the uses of the bank. The court said: "It is the duty of bank directors to use ordinary diligence to acquaint themselves with the business of the bank, and whatever information might be acquired by ordinary attention to their duties they may, in controversies with persons transacting business with the bank, be presumed to have. They cannot be heard to say that they were not apprised of facts shown to exist by the ledger, books, accounts, correspondence, reconcilements, and statements of the bank, and which would have come to their

[1] German Savings Bank *v.* Wulfekuhler, 19 Kans., 60.

[2] 9 Bush., 609.

knowledge except for their gross neglect or inattention. It is not necessary in many cases to show directly that the directors actually had their attention called to the mismanagement of the affairs of the bank or the misconduct of the subordinate officers. It is sufficient to show that the evidences of the mismanagement or misconduct were such that it must have been brought to their knowledge unless they were grossly negligent or willfully careless in the discharge of their duties. If it shall turn out upon the trial of these actions that the ledgers, books, etc., of the bank showed that the special deposits of these appellants were being sold, and that this fact would have been discovered by appellees by the use of ordinary diligence, then the presumption of actual knowledge will arise."

Presumption Exists Only in Favor of Innocent Third Parties.—But this rule is founded in public policy, and its object is to protect innocent parties dealing with the bank and having an interest therein; it will not be upheld in favor of one who does not occupy the position of an innocent third party in interest. Accordingly, it has been held that an officer of a bank who had abstracted and misapplied some of its funds could not set up this presumption in order to show a ratification of his acts by the directors. For to have permitted him to do this would have been to turn a presumption, intended to enforce fidelity and watchfulness of the directors, into an instrument of injury and destruction to the bank and its stockholders.[1]

When Bank Is Charged with Knowledge of Director.—The general rule of agency that notice to the

[1] First Nat'l Bank *v.* Drake, 29 Kans., 311.

agent in the course of the transaction in which he is acting for his principal of facts affecting the nature and character of such transaction is constructive notice to the principal, applies in the case of a bank or other company or corporation, as well as in the case of an individual. But the rule requires that in order to charge the bank with the knowledge of the officer he must be acting as its agent in the business to which this knowledge relates; the mere fact that he is an officer will not affect the bank with his knowledge. And in general, if the knowledge of the officer was acquired in his official capacity, the bank also is presumed to have it; but if it was acquired as any private person may have acquired it, the bank is not chargeable.[1]

From these principles it follows that the bank cannot be affected by the knowledge of a director unless he is its representative in the business to which the knowledge relates, or unless he should communicate such knowledge to the board or to some other authorized agent of the bank. The bank will not be charged with his merely private knowledge, any more than it would with the knowledge of an entire stranger.[2] For, as we have seen elsewhere in this chapter, the directors can act only as a board, and a director as such has no independent powers of business. Thus, for instance, the mere fact that a director has knowledge that paper offered for discount is tainted with fraud will not affect the right of the bank to recover thereon; but if the

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[1] Nat'l Bank *v.* Norton, 1 Hill, 572; Washington Bank *v.* Lewis, 22 Pick., 24; Atlantic State Bank *v.* Savery, 82 N. Y., 291.

[2] Nat'l Bank *v.* Norton, *supra;* United States Bank *v.* Davis, 2 Hill, 451; Westfield Bank *v.* Cornen, 37 N. Y.. 320; First Nat'l Bank *v.* Gifford, 47 Iowa, 575.

director who has such knowledge acts for the bank in discounting the note, then his act is the act of the bank, and the bank will be held to have notice of all facts with which he is acquainted.[1]

Delegation of Authority to Subordinate Agencies.—The directors do not exercise a delegated authority in the sense in which the rule applies to agents and attorneys, who exercise the powers specially conferred on them and no others; and they may delegate many of their powers to inferior agents and to committees composed of a part only of the members of the board.[2] Thus, they may vest the power to make discounts in a committee consisting of only a few of the directors, or of a few of the directors and the principal executive officer or officers of the bank.[3] So they may delegate to a committee of their number authority to mortgage or sell the property of the corporation,[4] or to pay its debts,[5] or to borrow money and obtain discounts on its behalf.[6] And upon the same principle it was held, in the case of a banking corporation whose charter declared that its powers should be exercised by a board of twenty-three members, that a by-law authorizing a quorum of five directors, including the president, to transact ordinary business was a valid regulation.[7] And

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[1] Nat'l Security Bank *v.* Cushman, 121 Mass., 490.

[2] Hoyt *v.* Thompson, 19 N. Y., 207; Burrill *v.* Nahant Bank, 2 Metc. (Mass.), 163.

[3] Nat'l Security Bank *v.* Cushman, *supra.*

[4] Hoyt *v.* Thompson, *supra;* Burrill *v.* Nahant Bank, *supra.*

[5] *Ex parte* Conway, 4 Pike, 350.

[6] Ridgway *v.* Farmers' Bank, 12 S. & R., 256; Leavitt *v.* Yates, Sandf. Ch., 134.

[7] Hoyt *v.* Thompson, *supra.*

in this case the court, after showing that the directors might delegate to subordinate agents or agencies authority to transact the ordinary business of the corporation, said, in regard to the by-law in question: "It was in substance and effect a regulation which constituted a subordinate agency to conduct the ordinary business of the corporation. The persons composing the agency would change according as the quorum of five or more directors attending the meetings might be constituted of different individuals. But if the board could delegate the power of transacting business to five or more individuals named, no doubt exists that the same authority might be imparted to a shifting quorum composed of the same number."

The Degree of Care Required of Directors.—As to the degree of care required of directors in their management of the bank, it is generally stated to be such reasonable care as men usually exercise in the management of their own affairs of a similar nature.[1] Perhaps no clearer exposition of the law on this point has been given than that found in the opinion delivered by Earl, J., in the case of Hun *v.* Cary *et al.* That was a case against the trustees of a savings bank; but as the relation of such officers to their institutions is said to be the same as that of directors to other corporations[2] (and was so assumed in the opinion), the principles laid down are equally applicable to the directors of a commercial bank. Among other things, it was said by the court:

[1] Hun *v.* Cary, 82 N. Y., 65; Ackerman *v.* Halsey, 37 N. J. Eq., 356; Williams *v.* Halliard, 38 N. J. Eq., 373; Percy *v.* Millaudon, 3 La., 68: United Society of Shakers *v.* Underwood, 9 Bush., 609.

[2] Williams *v.* Halliard, *supra.*

"The relation existing between the corporation and its trustees is mainly that of principal and agent, and the relation between the trustees and the depositors is similar to that of trustee and *cestui que trust.* The trustees are bound to observe the limits placed upon their powers in the charter; and if they transcend such limits and cause damage, they incur liability. If they act fraudulently and do a willful wrong, it is not doubted that they may be held for all the damage they cause to the bank or its depositors. But if they act in good faith within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. That the trustees of such corporations are bound to use some diligence in the discharge of their duties cannot be disputed. All the authorities hold so. What degree of care and diligence are they bound to exercise? Not the highest degree, not such as a very vigilant or extremely careful person would exercise. If such were required, it would be difficult to find trustees who would incur the responsibility of such trust positions. It would not be proper to answer the question by saying the lowest degree. Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management

and control of his property, will exercise ordinary care and prudence in the trusts committed to them—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty—*crassa negligentia*—not to bestow them."[1]

It is not to be supposed that the degree of care required of bank directors is the same, and no greater, than that required of the directors of every other kind of corporation. The degree of care due from persons acting in behalf of others depends upon the objects to which the care is to be applied. Thus (to use an old and familiar illustration) the degree of care which would be sufficient where the object is a quantity of iron might be wholly insufficient where the object is a jewel. So, the affairs of a bank would seem to require a higher degree of care than the affairs of many other corporations, such, for instance, as turnpike, canal, or even manufacturing corporations. To banks are confided the funds of other persons, and their relations to the public are those of the greatest confidence and trust. Then, the assets of a bank are in such form that they may be readily misappropriated, and present extraordinary temptations to the persons who have them under their immediate control. The general test is the same in all cases, viz., that care which men of common prudence take of their own concerns; but it is quite plain that a prudent man would bestow a higher degree of care and

[1] See also Ackerman *v.* Halsey, 37 N. J. Eq., 356; Williams *v.* Halliard, 38 N. J. Eq., 373.

more attention upon the affairs of a bank than he would upon the affairs of a corporation the property of which is not so easily misapplied and the business of which does not need such constant supervision.

Must Exercise Ordinary Skill and Judgment.—The directors must also exercise ordinary skill and judgment. In the case of Hun *v.* Cary[1] it was said: "Like a mandatary, to whom he has been likened, he [a director] is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them. When damage is caused by his want of judgment, he cannot excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director and invites confidence in that relation undertakes, like a mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. Such is the rule applicable to public officers, to professional men, and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that the service is to be rendered gratuitously."

This case affords an excellent illustration of what will

[1] 82 N. Y., 65. There are judicial dicta to the effect that directors are not liable for a mistake of judgment, however gross, provided the mistake is honest and the acts are fairly within the scope of the powers and discretion confided to the managing body. But the rule stated in the text is thought to be the better one; certainly it is the safest for the directors to adopt as their guide.

amount to a failure to exercise reasonable skill and judgment. The assets of the bank at the time of the action complained of amounted to something less than $70,000 (the amount due to the depositors), and the bank was in fact insolvent. But the trustees, with a view to improving the financial condition of the institution by increasing its deposits, purchased a lot for $29,250 and agreed to erect a building thereon at a cost of $27,000, it being thought that an imposing building would be a good advertisement of the bank, and by attracting attention and inspiring confidence would draw deposits. A receiver was subsequently appointed, and at the time of his appointment this lot, and other assets which produced less than $1,000, constituted the whole property of the bank; and afterward the lot and building were lost by a mortgage foreclosure. The action was brought to recover from the trustees the damages caused by the improper investment of the funds of the bank. There was no question but that the trustees were honest in their intention; the sole point was whether under the circumstances the purchase was such as the trustees, in the exercise of ordinary prudence, skill, and care, could make; and it was held that the finding of the jury against them ought to be sustained.

One of the points made by the defense was that the price agreed on was not more than the lot was worth at the time of the purchase. But in reply to this the court said: "It matters not that the trustees purchased this lot for no more than a fair value, and that the loss was occasioned by the subsequent general decline in the value of real estate. They had no right to expose their bank to the hazard of such a decline. If the purchase was an improper one when made, it matters not

that the loss came from the unavoidable fall in the value of the real estate purchased. The jury may have found that it was grossly careless for the trustees to lock up the funds in their charge in such an investment, where they could not be reached in any emergency which was likely to arise in the affairs of the crippled bank."

May Commit Immediate Management to Executive Officers.—As a general rule, the directors are not deemed guilty of negligence when they commit the immediate management of the affairs of the bank to the principal executive officers. It is not expected that the directors will devote their whole time and attention to the bank's business and guard it from injury by constant superintendence. Moreover, they are commonly persons who are not professional bankers, and whose acquaintance with the banking business is limited; and in order to insure the success of the institution, they must, in a large measure, intrust the conduct of its affairs to officers known to possess the requisite knowledge and skill. A high degree of care in the selection of the officers is, of course, necessary; but after officers known to be competent and skillful have been chosen, the directors may trust them with the immediate management and control. Still it is not to be understood that they may turn over to such officers the absolute direction of the entire business. It is their duty to exercise a general control and supervision, and ordinarily this is all that is expected of them. But circumstances may arise which will impose upon them a higher degree of care. Thus, if they become acquainted with any fact calculated to put prudent men on their guard—as that the officers are violating the law, are making in-

judicious loans, or are misappropriating the funds of the bank—a degree of care commensurate with the evil to be avoided is due from them; and a failure to bestow such care will be considered gross negligence, for which they may be made individually responsible.

This appears to be the rule established by the most authoritative decisions, some of which are cited in the note.[1]

Liability for Violation of Law.— Independently of any statutory provision, the directors will be liable for losses resulting to the bank by reason of their violation of the laws by which the bank is governed. Thus, they will be liable if they invest the bank's funds in securities of a kind that the law does not permit the bank to make loans upon.[2] So, the directors of a national bank will be required to make good any loss occasioned by their violation of the provision limiting the amount of loans to one person to one-tenth of the capital stock.[3] And in such cases it is not essential, in order to charge them with liability, to show that they acted fraudulently or that they derived any benefit from the violation of law; it is sufficient that there was a culpable lack of prudence or failure to exercise with ordinary care their functions as *quasi* trustees of the funds of the bank by reason of which loss was sustained.[4] But this liability

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[1] Percy *v.* Millaudon, 8 Martin (N. S.), 68; Ackerman *v.* Halsey, 37 N. J. Eq., 356; Williams *v.* Halliard, 38 N. J. Eq., 373; Dunn's Adm'r *v.* Kyle's Ex'r, 14 Bush., 134; Movius *v.* Lee, 30 Fed. Rep., 298.

[2] Williams *v.* McDonald, 42 N. J. Eq., 392.

[3] Witters *v.* Sowles, 31 Fed. Rep., 1.

[4] Williams *v.* McDonald, *supra.*

will not extend to directors who did not authorize or participate in the making of such loans.[1]

Not Liable for Frauds of Co-Director.—In a late case in the United States Circuit Court for the northern district of New York it was held that the directors of a bank were not liable for loss occasioned to the bank through the frauds of a co-director in which they had no part, and which were perpetrated without their connivance or knowledge; and that it was not sufficient to charge them with liability that the frauds might have been prevented by the exercise on their part of a proper degree of supervision over the affairs of the bank.[2] This decision appears to have been based on sound principles, and is supported by adjudications in several cases where the directors of other kinds of corporations were sought to be charged with liability for the frauds of one of their associates.

The President.—The president of the board of directors is the presiding officer of the board, but otherwise his *ex officio* powers are not greater than those of any other director, except that, as the head of the board, he may bring suit in behalf of the bank, and in proceedings against the bank legal process may be served upon him.[3] Where he exercises a larger authority, it is not because such authority is inherent in the office, but because the board has, either expressly or impliedly,

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[1] Witters *v.* Sowles, 31 Fed. Rep., 1; Williams *v.* McDonald, 42 N. J. Eq., 392.

[2] Movius *v.* Lee, 30 Fed. Rep., 298.

[3] Hodges' Ex'r *v.* First Nat'l Bank, 22 Gratt., 58; First Nat'l Bank *v.* Kimberlands, 16 W. Va., 555.

conferred it upon him. It is impossible, therefore, to enumerate any powers pertaining to the office of president, because these must depend in all instances upon the circumstances of the case. His powers may range all the way from those of a simple director to those of head officer and general manager of the bank, having authority to represent it in all matters of business as fully as the board itself.

CHAPTER II.

THE CASHIER.

The cashier is the executive financial officer of the bank. It is by him or under his direction that its moneys are received and paid out, its debts collected and paid, and its commercial securities received or transferred. And although some of these duties may be performed by tellers and other subordinate officers, these act under his direction and are merely the instruments by which designated portions of his various functions are performed. The ordinary duties of the cashier have been defined by the Supreme Court of the United States as follows: "His ordinary duties are to keep all the funds of the bank, its notes, bills, and other choses in action to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives directly, or through the subordinate officers of the bank, all moneys and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the

bank where they have been deposited, and as the executive officer of the bank transacts most of its business."[1]

Power to Indorse and Transfer Securities.—As the chief financial officer and agent of the bank the cashier has *virtute officii* the power to indorse and transfer negotiable securities belonging to the bank, and no special authority for this purpose is required.[2] And he is the only officer of the bank who has authority *ex officio* to perform this duty.[3]

Power Not Affected by Statutes.—Provisions in bank charters and banking statutes to the effect that the contracts and engagements of the bank shall be signed by some other designated officer of the bank as well as by the cashier have uniformly been held not to comprehend the drawing and indorsing of commercial paper. A bank charter provided "that all bills, bonds, and notes and every other contract or engagement on behalf of the corporation shall be signed by the president and countersigned by the cashier; and the funds of the corporation shall in no case be liable for any contract or engagement unless the same shall be signed and countersigned as aforesaid." This provision was held by the Supreme Court of the United States not to apply to a check drawn upon another bank; and, accordingly, the

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[1] United States *v.* City Bank of Columbus, 21 How., 356. See also Merchants' Bank *v.* State Bank, 10 Wall., 604; Matthews *v.* Mass. Nat'l Bank, 1 Holmes, 396; Cochecho Nat'l Bank *v.* Haskell, 51 N. H., 116.

[2] Fleckner *v.* Bank of United States, 8 Wheat., 338; Wild *v.* Passamaquoddy Bank, 3 Mason, 505; City Bank *v.* Perkins, 29 N. Y., 554.

[3] Smith *v.* Lawson, 18 W. Va., 212.

bank was made liable on a check signed only by the cashier.[1] A similar construction has been placed by the New York courts upon the provisions of the general banking law of that State that "*contracts* made by any association, and all notes and bills by them issued and put in circulation as money, shall be signed by the president or vice-president and cashier thereof."[2] In Barnes *v.* Ontario Bank Allen, J., discussing this question, said: "The whole business of a bank is confided in the first instance to a board of directors, and they usually confer the power to transact its most important and daily financial operations to their cashier and teller. The cashier is usually intrusted with all the funds of a bank. He receives directly all moneys and notes. He delivers up all discounted notes on payment. He draws checks and drafts, and, in short, is the executive officer through whom and by whom the whole moneyed operations of the bank, in paying or receiving debts or discharging them, are to be conducted. It is his duty to apply the negotiable funds as well as the money of the bank to the payment of its debts. In receiving deposits did the Legislature ever contemplate that the depositor must wait for the president or vice-president to sign with the cashier a mere certificate or acknowledgment of the money by the cashier? The answer to this question is to me plain and conclusive. The power to receive must be a power to acknowledge the reception, and one follows as a necessary incident to the

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[1] Mechanics' Bank *v.* Bank of Columbia, 5 Wheat., 326.

[2] Safford *v.* Wyckoff, 4 Hill, 442; Barnes *v.* Ontario Bank, 19 N. Y., 152.

other." Like statutes in Illinois,[1] Indiana,[2] Wisconsin,[3] and North Carolina[4] have received the same construction. And in Georgia it was held that a provision in a bank charter to the effect that all contracts and engagements of the bank should be signed by the president and countersigned by the cashier could not have been intended to apply to those contracts which according to commercial law and usage appertain to the office of cashier, such as drawing or indorsing bills of exchange, checks, and drafts.[5]

Can Transfer Only Negotiable Securities and in Ordinary Course of Business.—But the cashier's power to transfer extends only to transfers of the negotiable securities of the bank made in the ordinary course of business. He has no inherent authority to sell or dispose of the non-negotiable property of the bank, as, for instance, mortgages held by it.[6] And his indorsement and transfer of negotiable securities will not be binding upon the bank unless made in the usual course of business. Thus, it has been held that the cashier could not pledge the securities of the bank for the payment of antecedent debts.[7] So, where a cashier, when his bank was insolvent and was about to close its doors, transferred some of its bills receivable to a customer in part

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[1] State Bank *v.* Kain, 1 Breese, 45.

[2] Jones *v.* Hawkins, 17 Ind., 550.

[3] Rockwell *v.* Elkhorn Bank, 13 Wis., 731.

[4] State Bank *v.* Locke, 4 Dev., 533.

[5] Merchants' Bank *v.* Central Bank, 1 Kelly, 430.

[6] Hoyt *v.* Thompson, 5 N. Y., 320; Leggett *v.* N. J. Man. Co., Sax. Ch., 542; Holt *v.* Bacon, 25 Miss., 567.

[7] State Bank *v.* Davis, 50 How. Pr., 447.

payment of his deposit, it was held that the cashier in so doing was acting in excess of his authority.[1]

Drawing or Indorsing Paper as "Cashier."—When paper is drawn or indorsed in the name of an individual, with the addition of the word "cashier," but without any bank being specified, parol evidence is admissible to show that when the paper was made or transferred such person was the cashier of the bank by which or through which title to the paper is claimed, and that in signing or indorsing the paper he was acting as the agent of such bank.[2] In the case of Bank of Genesee *v.* Patchin Bank[3] S. B. Stokes, the cashier of the Patchin Bank, sent to the Bank of Genesee to be discounted a bill of exchange payable to the order of "S. B. Stokes, Cas.," indorsed by him with the same addition to his signature and inclosed in a letter dated at the banking-house and signed "S. B. Stokes, Cas." It was held that these circumstances imported that the indorsement was that of the Patchin Bank in the regular course of business, and not that of S. B. Stokes individually. Denio, J., said: "The question was whether the indorsement of Stokes was private or official. In the absence of any evidence to connect the bill with the defendant's bank, he would be regarded as the payee and the indorser individually, and the abbreviation affixed to his name would be considered as a *descriptio personæ*. But when it has been shown that he was the defendant's cashier, the presumption would be that a note payable in that form was the property of

[1] Lamb *v.* Cecil, 28 W. Va., 653.

[2] Baldwin *v.* Bank of Newbury, 1 Wall., 234

[3] 19 N. Y., 312.

the bank." Likewise, in Bank of New York *v.* Bank of Ohio[1] it was held that a draft drawn payable to the order of "D. C. Converse, Esq., Cashier," who was the cashier of the defendant, was to be regarded as payable to the bank of which he was such officer.

Power to Certify Checks.—Another power which pertains to the office of cashier is that of certifying checks. This power is incidental to his authority to receive the deposits of customers and make payment to them.[2] In Cooke *v.* State National Bank Church, C. J., said: "The cashier has a right, by virtue of his office, to make this certificate when the drawer has funds. He is the custodian of the funds of the bank and of the books; he receives money and gives vouchers therefor; and whether upon receiving a check he pays it in money or gives the holder a certificate of deposit or draft, or a certificate that he will retain sufficient of the money standing to the drawer's credit to pay it when presented, he is in either case acting within the line of his duty and within scope of the authority which necessarily attaches to his office."

In the larger banks this duty is usually performed by the paying teller. But the fact that the teller has been authorized to certify does not of itself affect the right of the cashier to do the same thing. For the teller acts under the direction of the cashier, and in this, as in other matters, is merely the instrument by which the cashier performs a part of the functions of his office.[3]

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[1] 29 N. Y., 619. See also First Nat'l Bank of Angelica *v.* Hall, 44 N. Y., 395; Folger *v.* Chase, 18 Pick., 63.

[2] Merchants' Bank *v.* State Bank, 10 Wall., 604; Cooke *v.* State Nat'l Bank, 52 N. Y., 96.

[3] Merchants' Bank *v.* State Bank, *supra.*

Power to Borrow Money.—The cashier, in virtue of his general employment, and without any special delegation of authority for the purpose, may borrow money for the bank. His power in this respect is a necessary incident to his duty, as financial agent of the bank, of paying its debts and meeting its obligations.[1] And having the power to borrow, he has necessarily the power to bind the bank for the repayment of the money, and to execute and deliver the necessary assurances or undertakings therefor in any form not forbidden by law.[2]

Restriction of Powers Does Not Affect Third Persons Without Notice.—The directors may, of course, restrict the powers of the cashier if they see fit; but persons dealing with the bank in good faith have the right to presume that the cashier has the customary authority of such an officer, and they will not be affected by any limitation of his powers unless they have notice thereof.[3] Thus, persons dealing with him may assume that he is authorized to indorse and transfer the negotiable securities of the bank for its use, and any one taking commercial paper transferred by him, without notice of any restriction upon his authority in this respect, will have a good title thereto as against the bank.[4]

Powers Are Limited.—But the powers which the cashier may exercise *virtute officii* are only such as naturally pertain to the ordinary financial operations of the

[1] Barnes *v.* Ontario Bank, 19 N. Y., 152; Coats *v.* Donnell, 94 N. Y., 168; Donnell *v.* Lewis Co. Savings Bank, 80 Mo., 165.

[2] See cases cited in preceding note.

[3] Cooke *v.* State Nat'l Bank, 52 N. Y., 96; Loring *v.* Brodie, 134 Mass., 453.

[4] Bank of the State *v.* Wheeler, 21 Ind., 90.

bank. Accordingly, it has been held that he cannot bind the bank by his assurance to a person about to indorse a note that such person will incur no risk or responsibility by reason of such indorsement.[1] So, he has no power to release a surety from liability upon paper owned by the bank.[2] So, his powers do not extend to indemnifying an officer for levying upon property.[3] Nor can he bind the bank by a contract for the purchase or sale of real estate,[4] or by the assignment or release of a mortgage,[5] or by a sale of the safe and fixtures of the bank.[6] In short, the only powers inherent in the office of cashier are those which are naturally connected with or incidental to the duty of receiving and paying out the money of the bank and taking charge of its funds and securities.

Cannot Make Discounts.—The cashier has no authority to make discounts, or to bind the bank by contracts in reference thereto. This is a matter which requires the action of the board of directors, unless they have delegated the power to some subagency.[7]

Liable if He Transcends His Powers.—Without some authority to do so, either express or implied, he will be liable if he transcends the known powers of a

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[1] United States Bank *v.* Dunn, 6 Peters, 51.

[2] Daviess County Savings Association *v.* Sailor, 63 Mo., 24; Ecker *v.* First Nat'l Bank, 59 Md., 291.

[3] Watson *v.* Bennett, 12 Barb., 196.

[4] Winsor *v.* Lafayette County Bank, 18 Mo. App., 665.

[5] Martin *v.* Webb, 110 U. S., 7.

[6] Asher *v.* Sutton, 31 Kans., 286.

[7] United States Bank *v.* Dunn, *supra;* Martin *v.* Webb, *supra.*

cashier and loss results to the bank. Thus, where a cashier assumed to change the securities of the bank without the consent of the directors, his bondsmen were held liable for the loss thereby sustained by the bank.[1]

Cashier May Have Larger Powers.—We have been speaking of only those powers which ordinarily belong to the office of cashier, and which such an officer exercises merely *virtute officii.* But very often the cashier has much greater powers than these; in many instances he has almost the entire management of the bank, and exercises the powers of a general managing agent. That the directors may clothe him with such authority is unquestionable. Nor is it essential to his power to bind the bank in matters beyond the scope of his ordinary functions that the directors should have expressly conferred upon him such an authority.[2] "His authority may be by parol and collected from circumstances. It may be inferred from the general manner in which for a period sufficiently long to establish a settled course of business he has been allowed without interference to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When during a series of years or in numerous business transactions he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis

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[1] Barrington *v.* Bank of Washington, 14 Sergt. & R., 405.

[2] Martin *v.* Webb, 110 U. S., 7; City Bank of New Haven *v.* Perkins, 4 Bosw., 420; Caldwell *v.* Nat'l Mohawk Bank, 64 Barb., 333.

of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations."[1]

Must Exercise Reasonable Skill and Care.—In the performance of his duties as such officer the cashier is bound to the exercise of reasonable skill and ordinary care and diligence; and if, by reason of his failure to exercise such skill, care, or diligence, loss results to the bank, he and his bondsmen will be liable therefor.[2] And the usual condition of a cashier's bond that "he shall well and truly execute the duties of cashier" is violated by his neglect to use due skill and care, as well as by any fraudulent or dishonest act.[3] In Minor *v.* Mechanics' Bank Justice Story, delivering the opinion of the United States Supreme Court, said: "The condition that Minor shall 'well and truly execute the duties of cashier' of the bank is said to be merely a stipulation for honesty in the discharge of the duties, and not for skill, capacity, or diligence. We are of a different opinion. 'Well and truly to execute the duties of the office' includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently or unskillfully, if they are violated from want of capacity or want of care, they can never be said to be 'well and truly executed.' The operations of a bank require diligence, with fitness and capacity, as well as honesty, in its cashier; and the security for the faithful discharge of his duties would be utterly illusory if we

[1] Per Harlan, J., in Martin *v.* Webb, 110 U. S., 7.

[2] Minor *v.* Mechanics' Bank, 1 Peters, 46; Commercial Bank *v.* Ten Eyck, 48 N. Y., 305.

[3] Minor *v.* Mechanics' Bank, *supra;* Barrington *v.* Bank of Washington, 14 Sergt. & R., 405.

are to narrow down its import to a guaranty against personal fraud only.''

And where the condition of a cashier's bond was that he should well and truly perform the duties of cashier *to the best of his ability*, it was held by the Supreme Court of Pennsylvania that this was an undertaking that he would perform such duties with *competent skill and ability*.[1]

When Liable for Act or Neglect of Subordinate.—The cashier cannot be rendered liable for the wrongful or dishonest act of any of his subordinates unless his own neglect or collusion has caused or aided it.[2] As to how closely he must inspect the work of those under him will depend in a great measure upon the amount of business done by the bank and the methods of transacting it. The duties of the cashier in this respect were very clearly set forth by the Court of Appeals of Kentucky in the case of Batchelor *v.* Planters' National Bank of Louisville. The court said, among other things: ''The cashier is not an insurer of the honesty and fidelity of those who occupy subordinate positions in the bank; and while it is his duty to supervise and control the affairs of the bank and its officers under him in the discharge of their duties, he is required only to exercise that diligence in regard to the action of his subordinates consistent with the discharge of all his duties in connection with the bank, exercising that care and skill that is reasonable and practicable. He is not required to examine by actual inspection every original entry made by those under him, but his care extends to

[1] Barrington *v.* Bank of Washington, 14 Sergt. & R., 405.

[2] Batchelor *v.* Planters' Nat'l Bank of Louisville, 78 Ky., 435.

a general supervision of the books and affairs of the bank; and when it is shown that he has exercised such diligence as a prudent man would in the control of those under him and in the supervision of their work, he has discharged his duty."

The want of diligence on the part of the directors will not constitute a defense for a neglect of the cashier to exercise a proper supervision over a subordinate officer; and if he has himself been negligent, he and his sureties will be liable for the loss to the bank, though the directors might have discovered the fraud or defalcation of the subordinate, had they exercised reasonable diligence.[1]

When Liable for Permitting Overdrafts.—It is sometimes said that a cashier will be personally responsible whenever he allows customers to overdraw their accounts, and that even the fact that this is done with the sanction of the board of directors will not relieve the cashier or his sureties from liability for loss sustained by the bank by reason of such overdrafts.[2] The case of Minor *v.* Mechanics' Bank, decided by the United States Supreme Court in 1828, is cited as an authority for this view of the law, and the broad language used by Justice Story in that case does appear to go to that length.[3] But what was said by the court on that occasion must be taken, like all judicial utterances, with reference to the facts before the court. To say that a cashier is personally liable in all cases where he permits

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[1] Batchelor *v.* Planters' Nat'l Bank of Louisville, 78 Ky., 435.

[2] Market Street Bank *v.* Stumpe, 2 Mo. App., 540; Bank of St. Mary's *v.* Calder, 4 Strobhart (S. C.), 403.

[3] 1 Peters, 46.

an overdraft is stating the law too broadly. His liability would appear to depend upon the circumstances of each case, and whether, from all the facts of the case, his action has been prudent, when regarded in the light of the common practice of banks in this respect.[1]

When Not Liable for Failure to Comply With By-Laws.—A cashier in the performance of his duties is, of course, bound to comply with the by-laws and other regulations established by the directors for the management of the affairs of the bank, and ordinarily he will be liable for any loss resulting to the bank from his failure to do so. But it will sometimes happen that such compliance is impracticable or, indeed, impossible. Thus, for instance, the by-laws may require him to consult other officers or certain committees before taking action in designated matters; but this he may be unable to do by reason of the absence of such other officer, or by reason of the failure of such committees to meet, and in such case clearly he ought not be held liable for failing to conform to the regulation, when he has otherwise acted in the business with due vigilance and prudence.[2] On this head it has been said by the Court of Appeals of New York: "To impose upon the cashier the duty of carrying on the business of a bank, and yet hold him responsible for a neglect of duty in not consulting officers and committees who apparently held no meetings and systematically absented themselves from the performance of their duties, is an imposition which the law will not tolerate. It would be quite impracticable for the managing officer of a bank required to

[1] Commercial Bank *v.* Ten Eyck, 48 N. Y., 305. See page 43.
[2] Second Nat'l Bank *v.* Burt, 93 N. Y., 233.

keep it open daily to leave his place of business as each transaction requiring attention occurred to look up persons engaged in other employments and consult them in regard to such transactions."[1]

Sanction of Directors Will Not Excuse Violation of Duty.—Any violation of the duties of his office by the cashier will not be excused by the fact that it was done with the sanction of the board of directors. In the important case of Minor *v.* Mechanics' Bank the defendant sought to set up as a defense that the practice of allowing certain persons to overdraw their accounts (which was one of the grounds of the alleged neglect of the cashier) was known to the president and directors, and was expressly or tacitly acquiesced in and approved by them. But it was held that the defense was not good. And in the course of that part of the opinion devoted to this question the court said: "It [the instruction prayed for] supposes that the usage and practice of the cashier, under the sanction of the board, would justify a known misapplication of the funds of the bank. What is that usage and practice as put in the case? It is a usage to allow customers to overdraw, and to have their checks and notes charged up, without present funds in the bank. Stripped of all technical disguise, the usage and practice thus attempted to be sanctioned is a usage and practice to misapply the funds of the bank, and to connive at the withdrawal of the same, without any security in favor of certain privileged persons. Such a usage and practice is surely a manifest departure from the duty both of the directors and the cashier as cannot receive any countenance in a court of justice. It

[1] Second Nat'l Bank *v.* Burt, 93 N. Y., 233.

could not be supported by a vote of the directors, however formal; and, therefore, whenever done by the cashier, is at his own peril and upon the responsibility of himself and his sureties.'' [1]

But although the fact that it is done with the assent of a superior officer will not excuse the cashier for an improper or wrongful act, yet if the circumstances are such that he, exercising reasonable vigilance, would not suspect but that the transaction was right and proper, he will not be held personally liable.[2]

CHAPTER III.

BONDS OF OFFICERS.

It is the uniform practice of banks to require bonds of their cashiers, and in most instances bonds are also required from the subordinate officers. In this chapter it is proposed to state briefly some of the rules by which such obligations are governed, and to point out how the undertakings of sureties in such cases are construed.

The Scope of the Undertaking.—In Allison *v.* Farmers' Bank [3] the Court of Appeals of Virginia held that the surety in a bond conditioned for the faithful performance by the principal therein of the duties of book-keeper of the bank was not liable for money taken by him from the teller's drawer, the majority of the court being of the opinion that the surety, when he

[1] 1 Peters, 46.

[2] Commercial Bank *v.* Ten Eyck, 48 N. Y., 305.

[3] 6 Randolph, 204.

signed the bond, did not intend to bind himself that his principal would not commit a felony. But the doctrine of this case is not now regarded as sound. In Rochester City Bank *v.* Elwood[1] Wright, J., observed: "If the principles upon which this case was decided are to be imported into our law, I see not why every teller may not make false entries and every book-keeper abstract funds at pleasure by transcending the limits of the trust reposed. The doctrines put forth in the majority opinions would substantially cancel all official bonds for the safe-keeping of corporate or public funds." The proper construction of such an engagement appears to be that it guaranties that the person is honest and is a suitable person to be introduced into the bank as an employé thereof, and that if he avails himself of his position in the bank to abstract its funds his sureties will be liable.[2]

In Rochester City Bank *v.* Elwood the bond was conditioned that the principal obligor, one Gold, should faithfully discharge "the trust reposed in him as assistant book-keeper;" and the question was whether the embezzling of the funds of the bank by him, under cover of false entries in the books, was a breach of the bond for which the surety was liable. The bank was nonsuited in the court below on the ground that the bond did not cover such an embezzlement. But this judgment was reversed in the Court of Appeals. Wright, J., delivering the opinion, said: "I agree that the surety cannot be holden beyond the fair scope of his engagement, as intended by the parties, when undertaken; but the ques-

[1] 21 N. Y., 88.

[2] German American Bank *v.* Auth, 87 Penn. St., 419; Rochester City Bank *v.* Elwood, 21 N. Y., 88.

tion is, What was this intention, as expressed in the instrument, construed in the light of the circumstances surrounding its execution? Gold had been elected for a post in a banking institution which brought him into close and constant proximity with its money and property. His place was behind the counter of the institution, and practically he had nearly the opportunity of the cashier or teller to embezzle the funds of the corporation, and a better one to conceal such embezzlement and prevent its immediate detection. The receiving and paying out of the money of the bank was done by the cashier or teller, but it was not their duty to keep constant and exclusive watch over it. The temptation to purloin money constantly besets those employés of a bank who are directly within reach of it. These things are presumed to have been known to the parties, and under the circumstances the defendant Elwood guaranties that the appointee shall faithfully discharge a trust, as one of its employés, reposed in him by the bank. Now, can it fairly be said that the parties only contemplated and Elwood only intended a guaranty that Gold should keep the books of the bank correctly, and if a loss ensued from a default in this respect he would respond to the extent of such loss? I think not. * * * It seems to me that to carry out the intent of the parties the instrument should be construed as an absolute engagement of the defendant for the integrity and fidelity of his principal in the discharge of the trust reposed in him as an assistant book-keeper in the bank. The contract did not define the trust reposed, but indicated the department of duty to be assigned, and guarantied that the appointee was a trustworthy person to be introduced into the bank to

discharge that duty. Its obvious intention was to vouch for his honesty and fidelity to his trust as an employé of the bank."

Surety Released if Duties of Officer Are Changed.—If a surety has undertaken for the faithful conduct of a person in a particular office of the bank, a substantial change in the duties of the office will operate to discharge the surety, for this would be a variance from the obligation which he has assumed. Accordingly, it has been held that the surety upon the bond of a book-keeper was released because his principal had been assigned to perform additional duties as teller.[1] So, in a Canadian case, it was held that a surety for the performance of the duties of bank agent could not be made responsible for losses accruing after the agent had been appointed cashier, because the nature of the agency had been changed and the responsibilities were different, though really not so onerous as before.[2]

But the surety will not be discharged merely because new duties are assigned to the officer, if such duties are fairly within the scope of the office. Where a surety had undertaken that his principal would faithfully discharge "the trust reposed in him as assistant book-keeper," it was held that false entries made by the principal in the credit journal constituted a breach of the bond, though at the time the bond was given this book was kept by the teller.[3] The court, by Wright, J., observed: "Conceding that the surety covenanted that Gold should do his duty as an assistant book-keeper

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[1] Home Savings Bank *v.* Traube, 6 Mo. App., 221.

[2] Bank of Upper Canada *v.* Covert, 5 Upper Canada Q. B., 541.

[3] Rochester City Bank *v.* Elwood, 21 N. Y., 88.

merely, making entries in the credit journal was book-keeping, and was within the range of the class of duties that might be appropriately assigned to an assistant book-keeper. The teller, it is true, kept this book for some months after Gold went into the bank, and, in doing so, it might be appropriately said that he was acting as assistant book-keeper. We are not informed what books were assigned to Gold to keep when he entered the bank; but is not the idea an absurd one, that the managers of the bank could not assign to him the keeping of another book without releasing the surety from his obligation?''

Whether Sureties Released by Increase of Capital.—Whether the increase of the capital of a bank will discharge the sureties on the bond of a cashier or other officer will depend upon the nature of the undertaking and the circumstances of the particular case. Naturally, the presumption must be that it is within the contemplation of the parties that the bank will enlarge its business by all lawful ways and means not going beyond a banking business; and if the law in existence at the time the bond is made authorizes the increasing of the capital stock, an increase made in pursuance of such authority must be presumed to be within the condition of a bond where the terms are broad enough to include it in fair and reasonable intendment.[1]

[1] Lionberger *v.* Krieger, 88 Mo., 160. The condition of the bond in this case was as follows: ''Now, if the said J. Philip Krieger, jr., shall well and truly and faithfully perform the duties of cashier of said bank for and during all the time he shall hold such office of cashier of said bank, and for and during all the time he may continue to act as such cashier of said bank, whether under the present appointment or under future reappointments,

In a case in Delaware where the sureties of a cashier contended that they were discharged by an increase in the capital stock of the bank it was said by the court: "The simple answer to the proposition is that there was no enlargement of the duties of the officer. The sphere of his duties was the same, although the subject-matter of his charge might be increased, which is no more than what happens from day to day from the fluctuation in the amount of the deposits."[1]

Sureties Not Released by Neglect or Connivance of Superior Officers of Principal.—The sureties are not relieved from liability by the failure of the directors or managing officers to exercise a suitable

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and shall well, truly, and faithfully account for and render over to said bank all such money," etc., "and shall, while he continues in such service either under the present appointment or any future reappointment, faithfully and to the best of his ability perform all trusts reposed in him, and all duties devolved on him by the law of the land or by any by-law, rule, order, or resolution of said board now existing or hereafter made, enacted, or adopted not inconsistent with the laws of the land, then," etc. This is a very good form for a cashier's bond, and may be safely adopted as a precedent.

[1] Bank of Wilmington and Brandywine *v.* Wollaston, 3 Harrington, 90. But see Grocers' Bank *v.* Kingman, 16 Gray, 473. In the latter case it was held that sureties who had undertaken to save the bank harmless from every loss that might arise from the cashier's mistakes, as well as losses arising from his fraud, were discharged by an increase of the capital from $300,000 to $750,000. Possibly this case is susceptible of being distinguished from the cases which sustain the doctrine stated in the text; but, nevertheless, it is submitted that the principle of construction adopted in that case is much stricter than those which in the more recent authorities have been applied to the undertakings of guarantors.

supervision over the affairs of the bank, and to properly inspect the work of the officer or employé who is the principal in the bond.[1] A surety for a teller set up as a defense that before and at the time he signed the bond the bank had in force a by-law which required that the cashier should carefully observe the conduct of all officers employed under him; that he should daily examine the settlements of the cash accounts of the bank and take charge of the same, and whenever the actual account should materially disagree with the balance of the cash account he should report the same to the president and directors without delay; and that it was his duty to ascertain by personal examination how the account stood. It was alleged, also, that there was another by-law in force which provided that a committee of three directors should be appointed, whose duty it should be, among other things, to suddenly and without previous notice count the teller's cash-book at least once in each month, and in the same manner to count all the cash of the bank at least twice in each year, without notice, and with as much variation in time as would be most likely to frustrate any attempt to conceal any abstraction of funds that might have been made. The surety further alleged that he was induced to become security on the bond of the teller because he knew of the existence of these by-laws and requirements, and with the confident expectation that they would be enforced, but that the directors and officers had wholly failed to carry them into effect. But it was held that this neglect on the

[1] Chew *v.* Ellingwood, 86 Mo., 260; State, to use of Southern Bank, *v.* Atherton, 40 Mo., 209; Amherst Bank *v.* Root, 2 Metc., 522; Morris Canal and Banking Company *v.* Van Vorst, 1 Zabriskie (N. J.), 100.

part of the teller's superiors was no ground of defense for his sureties. The court said: "We cannot accede to the first proposition of the counsel for the defendant, that he is exonerated by reason of the negligence of the cashier and directors of the bank in failing to make frequent examinations of the affairs of the bank, to count the money, inspect the books, and generally to watch over its concerns. Their duties were perhaps not as diligently performed as they ought to have been, but the rules and by-laws were simply directory. They were intended to prescribe the duties of the cashier and directors, and a faithful compliance with them would no doubt result indirectly in favor of the sureties by tending to an early and speedy disclosure of fraud; yet a failure to comply with them cannot be held as a precedent condition to the sureties' liability. The principle contended for would have the effect to deprive a corporation of all remedy against one agent on account of the negligence or default of another. The cashier might excuse himself by pleading the failure of the directors to perform their duty, and the directors would excuse themselves by showing that the cashier had been guilty of neglect and omitted to execute the trust devolved upon him."[1]

Nor will it release the sureties that the acts alleged as a breach of the bond were permitted or connived at by the directors or managing agents.[2] If their principal has been dishonest, it is no excuse that there were other unfaithful officers; and if he has done illegal acts, the acquiescence or connivance of his superior officers

[1] State, to use of Southern Bank, *v.* Atherton, 40 Mo., 209.

[2] Minor *v.* Mechanics' Bank, 1 Peters, 461; Chew *v.* Ellingwood, 86 Mo., 260; Market Street Bank *v.* Stumpe, 2 Mo. App., 545.

affords him or his sureties no protection. But the doing of an improper or illegal act at the direction of his superior, when he has no reason to suppose that the act is illegal or improper, will not constitute a breach of an officer's bond.[1]

Effect of Laws Requiring Bonds.—Banking laws and bank charters frequently require that certain designated officers of the bank (as, for instance, cashiers) shall give bonds before entering upon the duties of their offices, and sometimes the statute or charter prescribes the conditions of such a bond. But the effect of such a statute is not to render void a bond which is not in conformity thereto; but such bond, though invalid as a bond under the statute, will be valid as a common-law bond if there is nothing immoral or unlawful in its stipulations.[2]

Directors as Sureties.—It is not considered proper that a director should be a surety upon the bond of an officer of the bank. But where a director does become such a surety, neither he nor his co-obligors can set up this fact as a matter of defense.[3] In Amherst Bank *v.* Root, where the point was raised that the cashier's bond was void as against the policy of the law because three of the directors, whose duty it was to examine and approve the bond, were sureties thereon, Shaw, C. J., said: "This exception certainly comes with a very bad grace from those directors who thus became sureties. It sets up the dereliction of their duty as directors to

[1] Commercial Bank *v.* Ten Eyck, 48 N. Y., 305.

[2] Franklin Bank *v.* Cooper, 36 Me., 179; Lionberger *v.* Krieger, 88 Mo., 160.

[3] Amherst Bank *v.* Root, 2 Metc. (Mass.), 522.

avoid their obligation as contractors. It may have been in very bad taste, it may have been indiscreet and ill-judged to put themselves in a situation to express an opinion on their own sufficiency as such sureties. But whether right or wrong, it is impossible to perceive how the obligors, either such directors themselves or their co-obligors, can avail themselves of this circumstance to avoid their obligation."

And it would seem that upon principles of law now well settled the director could not set up his disability as a defense, even though the statute should, as is the case in some States, expressly forbid that a director should be such a surety.

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